BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Bear Creek Mining Corporation
Claimant,

v.

Republic of Perú
Respondent.

Case No. ARB/14/21

Respondent's Rejoinder on the Merits and Reply on Jurisdiction

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I. INTRODUCTION

1. In its Counter-Memorial, Respondent noted that if Claimant receives even a fraction of its US$520 million damages claim, this Arbitration will have been the most profitable business venture in Bear Creek's corporate history. After all, Claimant is a junior exploration company that has never produced an ounce of metal in Peru or anywhere else in the world.

2. But the outlandishness of that claim—for half a *billion* dollars—is truly driven home with a quick look at what, exactly, Bear Creek had in its hands as the basis for its claim. This entire case is based on mining concessions that:

- Bear Creek chose to acquire illegally, in violation of the Peruvian Constitution's restrictions on foreign investment in natural resources near the country's borders;
- faced indigenous community opposition so intense that it was a trigger of months of violent protests that paralyzed an entire region of Perú;
- depended on securing nearly 100 land use agreements and a broader "social license" from the Project's mostly hostile neighbors; and
- conferred no right to mine anything, unless and until the company could obtain all of the dozens of government permits and authorizations necessary to build or operate a mine—which it was nowhere close to obtaining and might never obtain.

3. And to prove this massive claim, Claimant's principal evidence is largely uncorroborated witness testimony from its own executives—who also happen to be some of Bear Creek's major shareholders:

Shareholder & Fact Witness	Shares Owned[1]	Value of Shares owned[2]
Andrew Swarthout	1,394,592	US$2,205,961
Catherine McLeod-Seltzer	1,266,562	US$2,032,856
Elsiario Antunez de Mayolo	965,000	US$1,548,466

4. These are not the building blocks of a promising investment, or of a convincing arbitration claim. These are the hallmarks of a claim built on supposition and exaggeration, for the benefit of Claimant and its shareholders.

5. But as a threshold matter, this Tribunal should not hear that case at all—it lacks jurisdiction over these claims, or should dismiss them as inadmissible, because they all rest on an unlawfully obtained investment. Claimant says that the Tribunal may hear its claim even if its investment was made illegally and in bad faith, in violation of a provision of the Peruvian Constitution. Investment treaty jurisprudence says otherwise. Respondent cites an array of cases in which tribunals reject the proposition that the international investment treaty system protects investments that are made in violation of the host state's laws. This is not a case where Respondent seeks to disqualify an investor based on noncompliance with some ancillary law or regulation, or based on legal breaches after the investment is made. This is a case where Claimant's very acquisition of the Santa Ana mineral concessions violated a longstanding

[1] Canadian System for Electronic Disclosure by Insiders, Insider Transaction Details for Andrew Swarthout, April 12, 2016, at 10 [Exhibit R-414]; Canadian System for Electronic Disclosure by Insiders, Insider Transaction Details for Catherine McLeod-Seltzer, April 12, 2016, at 13 [Exhibit R-415]; Canadian System for Electronic Disclosure by Insiders, Insider Transaction Details for Elsiario Antunez de Mayolo, April 11, 2016, at 3 [Exhibit R-416].

[2] Calculated using Bear Creek's share price as of April 12, 2016 –CAD$2.05 or US$1.60.

provision of Peru's Constitution that is specifically directed to controlling natural resource investments by foreigners in the border zone   As such, Claimant cannot maintain an investment claim based on its illegally obtained rights at Santa Ana.

6. Claimant is left to argue—through a circuitous and confused discussion of Peruvian law—that its scheme to acquire rights at Santa Ana was, in fact, legal. Claimant's effort fails. Rather than abide by the Constitution, Claimant used its own Peruvian employee and legal representative as a front to acquire the concession rights at Santa Ana on its behalf, without first seeking the consent of Peru's Council of Ministers. Mr. Swarthout has been quite forthcoming about Claimant's ruse to acquire Santa Ana. He explained that Bear Creek's plan to circumvent Article 71 was to "identify a trustworthy Peruvian citizen or company interested in applying for mineral concessions in Santa Ana and enter[] into an option agreement allowing Bear Creek to acquire these concessions." Bear Creek put that plan into action and acquired concession rights at Santa Ana. But as Respondent has explained, this violated Article 71 of Peru's Constitution, which prohibits even the "indirect" acquisition of such concessions by foreigners unless they have the Council of Ministers' blessing.

7. After its dubious acquisition of the Santa Ana concessions, Claimant set out to develop the site—its first-ever venture toward actual mining. Claimant's inexperience was laid bare during its interactions with local communities. Claimant would have the Tribunal believe that its community outreach efforts were sufficient because they met the minimum requirements under Peruvian law. This just demonstrates Claimant's naiveté. As would be obvious to any *experienced* mine operator, quite apart from complying with the letter of the law and obtaining all necessary permits and licenses from the Government, Claimant also needed to obtain a "social license" from surrounding communities before it could move forward.

8. Far from winning community support, however, Claimant attracted the opposition of the local indigenous populations. Claimant alienated and angered locals by engaging with only a small minority of the surrounding communities—those on whose lands the Project would actually sit—while ignoring the vast majority of those communities nearby the site, including some 27 communities in what Bear Creek itself called the "area of influence" of the proposed Santa Ana mine. Claimant also failed to take into account the perspectives of the indigenous Aymara people who make up those communities, who revere the land and water as sacred, are bound by very strong community ties and collective decision-making, have an agricultural lifestyle dependent on the land and generally low levels of formal education, and have no experience with mining other than the negative reports they hear from other Aymara communities elsewhere who have suffered contamination of their land and water resources.

9. Claimant's community outreach efforts floundered, and, over time, widespread opposition grew into protests by hundreds, then thousands, and then tens of thousands of citizens. That opposition was longstanding; it did not suddenly appear in April or May of 2011. It had flared in 2008 with a protest by thousands of community members and the burning of Bear Creek's camp. It was reignited by a February 23, 2011 public hearing about Bear Creek's large-scale open-pit exploitation plans, and then it flamed into months-long paralyzing protests in the South of and then throughout the Department of Puno. At least with respect to the southern part of Puno, those protests can be traced directly back to Claimant's failed social outreach efforts.

10. Claimant feigns ignorance of its central role in triggering these protests, implausibly declaring them "not related" to the Santa Ana project. This is false. To offer just one colorful example, consider the following placard captured in a 2011 news report about the protests in the Department of Puno:

Translation: "No to the Santa Ana Mine. Long live the fight of the Aymara. People power!"

11. As the protests intensified, business and even cross-border trade with Bolivia was paralyzed, and the crisis mounted, Government action became imperative. At the same time, Government officials became aware of the unlawful scheme through which Claimant had initially indirectly obtained its concession rights at Santa Ana. This too called for a Government response.

12. That response took the form of a set of multiple interdependent measures—many of which applied generally—that included Supreme Decree No. 032. Claimant protests that it was singled out, but directing that one measure (out of many) at Bear Creek's Santa Ana Project was proper because the Decree aimed to address: (i) Claimant's illegal acquisition of rights at Santa Ana; and (ii) one of the key triggers of the social unrest—the affected communities' opposition to the Santa Ana Project, for which Claimant was substantially responsible.

13. Despite Respondent's clear and consistent explanation of why the Government issued Supreme Decree No. 032, Claimant clings to an argument that the measure was somehow

"political." But what possible political advantage could have been gained by an outgoing government enacting a decree during its final month in office, to appease a political minority in a remote corner of the country that supported the government's political opponents? Claimant does not say. More to the point, Claimant has provided no evidence of that "political" motivation. It just asserts that this is so. Unless and until Claimant can explain why its "political" story is at all logical—and can prove that it is indeed true—the Tribunal cannot accept it as fact.

14. Unfortunately for Claimant, its "political" story is the linchpin of its entire legal argument. With respect to expropriation, Claimant's "political" argument is its only defense to Respondent's invocation of police powers. Yet Respondent has demonstrated that Supreme Decree No. 032 was a rational policy choice enacted to calm escalating unrest and protect the integrity of Peru's Constitution and its regulatory processes. Respondent has also shown that international law affords States great deference in making these types of sovereign, regulatory choices. The Decree, therefore, was a proper exercise of police powers and in no way expropriatory.

15. Claimant's resort to a fair and equitable treatment ("FET") claim is equally meritless. There, Claimant faces a high evidentiary bar: Peru and Canada unequivocally agreed to limit the FTA's guarantee of FET to the international law minimum standard of treatment ("MST"). International jurisprudence, both historical and modern, is clear that the MST represents a very high burden for would-be claimants—one Bear Creek cannot hope to meet. Nor may Claimant import a more favorable, autonomous FET standard from other Peruvian treaties, and even if it could, its claims would still fail. Peru's actions were not arbitrary and did not violate any expectations that Claimant legitimately could have held.

16. Claimant also still maintains its terse claims regarding full protection and security ("FPS") and unreasonable and discriminatory measures ("UDM"). Once again, the brevity of these claims suggests that Claimant knows they are weak: both appear in a single subsection, and the discussion of UDM barely stretches to a second page. Although Respondent answers and rebuts both claims, the Tribunal would be entitled to draw conclusions from Claimant's near-silence as well.

17. In light of the above, the Tribunal need not even reach a damages analysis. If it does, however, the Tribunal will quickly learn that Claimant's damages claim is inflated, unreliable, and disconnected from reality. Claimant's quantum experts at FTI Consulting ("FTI") considered two unpermitted, un-built, would-be mining projects in the hands of an inexperienced operator. From this, FTI was able to engineer a half-billion dollar damages claim.

18. FTI achieved this feat by applying a simplistic discounted cash flow ("DCF") methodology that is sensitive to large swings in valuation from small tweaks to the assumptions used. To assist in this endeavor, Claimant sought input from technical mining experts Roscoe Postle Associates ("RPA"). RPA's analysis is rife with mistakes (most of which, unsurprisingly, inure to Claimant's benefit). For instance, RPA recommends, and FTI adopts, overly ambitious production timelines and exaggerated estimates of economically mineable silver. These flawed inputs, when combined with FTI's faulty DCF model, lead to a valuation that is overstated and incorrect.

19. Professor Graham Davis and the Brattle Group ("Brattle") have explained that the key flaw in FTI's model is that it fails to include calibration to Bear Creek's share price. By ignoring the *actual* market value of Bear Creek (as measured by its share price), FTI reaches a

valuation for Santa Ana that is *much more than double* what the market says it is worth. As Brattle has explained, and as common sense would dictate, this simply cannot be correct.

20. Brattle performed its own DCF analysis using a modern methodology that better accounts for risks and—critically—includes calibration to Bear Creek's stock price. Brattle's refined approach to DCF analysis produces a valuation for Santa Ana that aligns with reality, *i.e.* it is consistent with Bear Creek's share price. Even Brattle's modern approach to DCF, however, produces a wide range of potential damages figures. Brattle's struggle to narrow its estimates demonstrates the difficulties inherent in using discounted cash flow analysis to value an asset like Santa Ana, which has no history of operational cash flows. Recognizing this challenge, when faced with similar early-stage, non-producing assets, arbitral tribunals consistently steer clear of DCF analysis, and instead award damages equal to amounts invested. This Tribunal, if it somehow were to reach a damages analysis for Santa Ana, should do the same.

21. Regarding Corani, in its Counter-Memorial, Respondent referred to this claim as a "throw away." Nothing in Claimant's Reply changes that assessment. Claimant relies on unsupported—and directly contradicted—witness testimony from Mr. Swarthout to try to show that it suffered damages at Corani, a different project in a different area, due to Supreme Decree No. 032. The Tribunal should see this claim for what it is: an attempt to inflate the headline numbers of Bear Creek's claims, in the hopes that the Tribunal will "split the baby" at a high midpoint. In neither of its submissions was Claimant able to cite a single case where—as it requests here—a tribunal awarded damages for a project directly impacted by a measure *and* a second, separate project.

22. For the reasons described more fully herein, the Tribunal must reject all of Claimant's claims in full. In the sections that follow, Respondent explains that: (i) Claimant's

claims are undermined by the factual record (Section II below); (ii) the Tribunal lacks jurisdiction to hear this case (Section III below); (iii) Claimant's legal claims fail (Section IV below); and (iv) Claimant's damages calculations are inappropriate, unreliable and grossly inflated (Section V below).

23. Respondent's Rejoinder is accompanied by 181 factual exhibits numbered R-239 to R-420, and 22 legal authorities numbered RLA-076 to RLA-096. Respondent also submits the following witness statements and expert reports:

- Witness Statement of Rosario de Pilar Fernández Figueroa (RWS-004);
- Second Witness Statement of Fernando Gala (RWS-005);
- Second Witness Statement of Felipe A. Ramírez Delpino (RWS-006);
- Second Witness Statement of César Zegarra (RWS-007);
- Expert Report of Jorge Danos Ordóñez (REX-006);
- Second Expert Report of Francisco Eguiguren Praeli (REX-007);
- Second Expert Report of Antonio Alfonso Peña Jumpa (REX-008);
- Second Expert Report of Luis Rodríguez-Mariátegui Canny (REX-009);
- Second Expert Valuation Report of Prof. Graham Davis and The Brattle Group (REX-010);
- Second Expert Technical Mining Report of SRK Consulting (REX-011).

II. FACTUAL BACKGROUND

A. BEAR CREEK'S (LACK OF) EXPERIENCE

24. In its Counter-Memorial, Perú clarified for the Tribunal that, although Claimant has portrayed itself as a mining company that has "developed world class mining projects at Santa Ana and Corani,"[3] the reality is that Bear Creek Mining Corporation, the Claimant in this

[3] Claimant's Memorial on the Merits, May 29, 2015 ("Claimant's Memorial"), at *chapeau* to para. 44.

case, has never developed, constructed, or exploited a mine of any sort. Instead, Claimant is, according to its own Canadian securities filings, a "corporation engaged in the acquisition and exploration of mineral properties . . ." that "has received no revenue to date from the exploration activities on its properties."[4] It is also listed on the Canadian TSX Venture Exchange, the stock exchange for "small and early-stage companies" that may at some point "work towards graduation to the senior Exchange."[5] Indeed, Claimant confirms, as it must, that it has never constructed or operated a mine before. Claimant's witness Ms. Catherine McLeod-Seltzer, who is the Chairman of the Board of Directors of Claimant, admits that, if it built Santa Ana, then Claimant would "*[b]ecom[e]* a producer [of minerals]"[6] because it currently is not one. That would be beneficial because certain debt financing is "something that is generally not available to exploration companies" like Claimant.[7] It therefore is not in dispute that Santa Ana was the first mining production project that the Claimant had ever attempted.

25. It is perhaps for that reason that Claimant, in its Reply, mounted a spirited defense of the so-called "junior" mining companies that engage in exploration activities and then sell the rights to any discovered minerals to a "senior" or "major" mining company that will develop and build the mine and extract the minerals.[8] Yet, this defense is peculiar given Claimant's insistence that at all times it planned to actually construct and operate the Santa Ana and Corani

[4] Bear Creek Annual Information Form, April 3, 2014, at pp. 6, 9 [Exhibit R-237].

[5] TMX, *Guide to Listing Toronto Stock Exchange and TSX Venture Exchange*, 2016, at p. 14 [Exhibit R-295]. The Toronto Stock Exchange, on the other hand, "is the right choice for growth-oriented companies with strong performance track records." *Id.* [Exhibit R-295]. Additionally, the Toronto Stock Exchange *Guide to Listing* does not denote companies as "junior" and "senior," but rather, it divides the "Mining Sector" into "exploration and mining companies." *Id.* at pp. 25-26 [Exhibit R-295].

[6] Witness Statement of Catherine McLeod-Seltzer, December 14, 2015 ("McLeod-Seltzer Witness Statement"), at para. 18.

[7] McLeod-Seltzer Witness Statement at para. 18.

[8] Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, January 8, 2015 ("Claimant's Reply"), at para. 6; Witness Statement of Peter M. Brown, December 14, 2015 ("Brown Witness Statement"), at paras. 11-15.

mines itself, and its claims to damages based on its alleged inability to self-finance its operations.[9]

26. Perú sought to clarify this issue—which Claimant obscures—not as an attempt "to belittle Bear Creek for being a junior mining company," as Claimant suggests,[10] but to demonstrate that Claimant possesses zero experience in successfully completing the type of mining projects that it had planned for Santa Ana and Corani. This is relevant for at least two reasons. First, Claimant maintains that it played no role in causing the region-wide social uprising that specifically demanded the cancellation of the Santa Ana Project.[11] Such an implausible claim could only come from a company that had never before navigated the regulatory and social pathways needed to engage local communities and earn support for a fully operational mine anywhere in the world, much less in Peru. Perhaps as a junior company, having caused only the relatively minimal social intrusion to explore a piece of land, it did not appreciate the very different situation that would emerge when it proposed to move into the realm of senior companies who are aware of how communities react to much more invasive proposals to construct an open pit mine and exploit resources. The level of social engagement needed at the exploration stage is far less than what a company must do to earn the social license needed at latter stages of a project. A junior company is more likely to leave the more significant social outreach to its senior successor—and perhaps that junior mindset was what led Bear Creek to neglect the communities that eventually erupted in massive protests against the Santa Ana Project.

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[9] Claimant's Reply at para. 29.

[10] Claimant's Reply at para. 6.

[11] *See, e.g.*, Claimant's Reply at paras. 68-71.

27. Second, Claimant has boldly asserted damages for decades of speculative future lost profits from the hoped-for operations of two large-scale silver mines[12] even though it never achieved the necessary permits or authorizations to construct or operate either mine. Instead, Claimant expects the Tribunal to speculate that Claimant *would have* been able to receive all the many permits and approvals and do so on Claimant's precise time schedule, even in the midst of a massive social uprising that paralyzed cities, blocked commerce between Bolivia and Peru, and resulted in the deaths of Peruvian citizens. Claimant therefore asks this Tribunal to assume, and award damages on the basis, that Claimant was certain to transition seamlessly from a junior mining company—one "engaged in the acquisition and exploration of mineral properties" only[13]—to a full-fledged senior mining company that constructs and operates mines. This assumption is implausible at best.

28. In an attempt to bolster its *bona fides*, Claimant has presented a litany of Claimant's executives or financial backers who testify to their own personal confidence, competence, and experience.[14] Mr. Peter M. Brown is the former President and CEO of Canaccord Genuity Group[15] which is, in Mr. Brown's own words, "an active and continuous supporter of Bear Creek Mining from its inception to today" and has "participated . . . in every one of Bear Creek's rounds of financing since the company's listing in 2003."[16] Mr. Brown is also a personal acquaintance of Claimant's primary founders, and witnesses in this arbitration,

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[12] *See* Claimant's Reply at paras. 412-16.

[13] Bear Creek Annual Information Form, April 3, 2014, at p. 6 [Exhibit R-237].

[14] *See* Claimant's Reply at paras. 7-15; *see also generally* Witness Statement of Randy Smallwood, December 21, 2015 ("Smallwood Witness Statement"); Brown Witness Statement ; McLeod-Seltzer Witness Statement.

[15] Mr. Brown left his role with Canaccord in 2007, before Claimant formerly acquired the Santa Ana concessions, but after Claimant had arranged for Ms. Villavicencio to acquire the concessions and sell them to Claimant and also after Claimant had explored some of the Santa Ana concessions allegedly on behalf of their nominal owner, Ms. Villavicencio.

[16] Brown Witness Statement at para. 7.

Ms. McLeod-Seltzer and Mr. Andrew Swarthout.[17] Given his former company's financial support and his own personal support of Claimant and its founders, it is not surprising that Mr. Brown touts Claimant's "unique combination of skills" before offering the unfounded speculation that "Bear Creek has everything it takes to move from exploration to development and from development to production."[18] Regardless of whether this statement is or is not true in the abstract, Mr. Brown does not appear to possess any knowledge of the facts related to, for example, the social situation in Puno; or the serious deficiencies that remained in Claimant's environmental impact assessment ("EIA"), a requirement before Claimant could proceed with the myriad other permits and authorizations required to construct and operate Santa Ana; or the negotiations that Claimant had yet to conclude with nearly 100 local landowners and possessors to acquire land use rights to build the mine. His speculation that Bear Creek "has everything it takes" is therefore of no probative value to this Tribunal.

29. Mr. Randy Smallwood is the President and CEO of Claimant's largest shareholder, Silver Wheaton Corporation.[19] His company has invested almost CN$70 million in Bear Creek, with about CN$40 million invested even before Bear Creek acquired the Santa Ana concessions.[20] It is therefore no surprise that Mr. Smallwood would testify that he "believed that Santa Ana and Corani would become successful mining operations."[21] Much like Mr. Brown, Mr. Smallwood does not testify to any knowledge of any relevant facts that would lead the Tribunal to know, for example, whether or not Claimant took steps sufficient to garner community support for the Santa Ana Project, or whether or not Claimant would have been able

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[17] Brown Witness Statement at para. 8.

[18] Brown Witness Statement at para. 9.

[19] Smallwood Witness Statement at para. 1.

[20] Smallwood Witness Statement at para. 10.

[21] Smallwood Witness Statement at para. 17.

to acquire the necessary permits and authorizations to construct and operate the Santa Ana Project. Mr. Smallwood, like Mr. Brown, is in effect, just a (self-interested) character witness for Claimant.

30. Next, Claimant has presented a witness statement from Ms. Catherine McLeod-Seltzer, the current Chairperson of the Board of Directors of Bear Creek.[22] Ms. McLeod-Seltzer's resumé of experience is almost exclusively in the field of founding, financing, managing, and selling-off junior mining companies. In fact, the two "highly-successful mining companies in Peru"[23] with which Ms. McLeod-Seltzer was involved and which she discussed in her witness statement—Arequipa Resources Ltd. and Perú Copper Inc.—were "successful" because she helped to sell them for $800 million[24] and $791 million,[25] respectively, *before* either company reached the production phase.

31. These two projects are also notable for other reasons. Perú Copper Inc. was sold to a Chinese company Chinalco[26] to pursue the "Toromocho Project," and Arequipa Resources Ltd. was sold to Barrick Gold Corporation[27] in conjunction with the "Pierina Project". Both of these projects were significantly delayed due to community opposition. Although Chinalco completed the purchase of the Toromocho Project in July 2007, the open-pit mine did not begin producing copper until the end of 2013, five years later, because the local populations had to be relocated from their native lands in a drawn-out and contentious process.[28] Shortly thereafter,

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[22] McLeod-Seltzer Witness Statement at para. 1.

[23] McLeod-Seltzer Witness Statement at para. 1.

[24] McLeod-Seltzer Witness Statement at para. 5.

[25] McLeod-Seltzer Witness Statement at para. 7.

[26] McLeod-Seltzer Witness Statement at para. 7.

[27] McLeod-Seltzer Witness Statement at para. 5.

[28] *See* "Chinese Copper Mine Halts Operations in Perú over Pollution Claim," *South China Morning Post,* March 30, 2014, *available at* http://www.scmp.com/news/world/article/1460977/peru-orders-chinalco-mining-giant-stop-

Perú's governmental monitor, the Organization of Environmental Evaluation and Prosecution ("OEFA"), discovered that the project was discharging dangerous, heavy-metal saturated water into surrounding lakes, and shut the project down temporarily.[29] The Pierina Project has also faced social unrest due to local community concerns about contamination of water supply.[30] In 2012, members of a local community blocked an access road to the mine and clashed with police, leading to the death of one of the protestors.[31] Yet despite those companies' experiences, Ms. McLeod-Seltzer and Claimant blithely insist that Bear Creek faced no similar risks of opposition at Santa Ana.

32. Mr. Andrew Swarthout has also spent his career in the exploration field and in financing mining projects, as he explained in his first witness statement[32]—but apparently not in constructing or operating them. Mr. Swarthout's profile on Bloomberg's Business site describes

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waste-dumps-after-detecting (last visited April 12, 2016) [Exhibit R-405]; Resolution on Precautionary Measures Suspending Mining Activities for Minera Chinalco Perú S.A., Resolution No. 005-2014-ORFA-DS, April 11, 2014 [Exhibit R-404].

[29] *See* "Morococha's Move Causes Disputes," *La Republica*, November 19, 2012, *available at* http://larepublica.pe/19-11-2012/traslado-de-morococha-genera-enfrentamientos (last visited April 12, 2016) [Exhibit R-406]; "Mining Prospects That Are Moving Slowly But Surely," *La Republica*, August 31, 2012, *available at* http://larepublica.pe/30-08-2012/proyectos-mineros-que-avanzan-paso-lento-pero-seguro (last visited April 12, 2016) [Exhibit R-407]; "Mining in Toromocho Will Require the Move of the Whole Town," *La Republica*, November 4, 2007 *available at* http://larepublica.pe/04-11-2007/trasladaran-todo-un-pueblo-para-desarrollar-mineria-en-toromocho (last visited April 12, 2016) [Exhibit R-408]; "Authoritarian Move of a City is Denounced," *La Republica*, October 18, 2011, *available at* http://larepublica.pe/18-10-2011/denuncian-traslado-autoritario-de-ciudad (last visited April 12, 2016) [Exhibit R-409]; "MEM: Mining Projects Will Start Operating Only in 2015," *La Republica*, August 18, 2013, *available at* http://larepublica.pe/18-08-2013/mem-proyectos-mineros-iniciaran-operaciones-hasta-el-2015 (last visited April 12, 2016) [Exhibit R-410].

[30] "Barrick Halts Operations at Perú Mine for One Day," *The Wall Street Journal*, *available at* http://www.wsj.com/articles/SB10000872396390444165804578008254153386218 (last visited April 7, 2016) [Exhibit R-296].

[31] "Barrick Halts Operations at Perú Mine for One Day," *The Wall Street Journal*, *available at* http://www.wsj.com/articles/SB10000872396390444165804578008254153386218 (last visited April 7, 2016) [Exhibit R-296].

[32] *See* Witness Statement of Andrew T. Swarthout, May 28, 2015 ("Swarthout First Witness Statement"), at paras. 3-9.

his “more than 30 years of mineral *exploration* experience” but says nothing about any experience constructing and operating mines.[33]

33. Finally, it is notable that several of Claimant’s principals have spent a portion of their careers at Southern Perú Copper (“SPCC”), which Claimant describes as “the largest and most respected copper mining company in Peru.”[34] SPCC is also the owner and operator of the Tia Maria Project in southern Perú near Arequipa. In fact, Mr. Swarthout claims credit for discovering this deposit.[35] As Perú will explain in Section H.2 below,[36] the Tia Maria Project has been marred by violent public protests due to concerns about potential environmental contamination.[37] Moreover, the DGAAM rejected SPCC’s first Tia Maria EIA because it was insufficient.[38] While no one project is the same as another, Tia Maria shows that even a company with the experience of SPCC cannot be assured that it will be able to achieve regulatory and social approval to operate.

34. It is simply not reasonable for Claimant to ask this Tribunal to assume that mining executives with a history of discovering, developing, and then selling mineral deposits would be certain to successfully transform Claimant into a full-fledged senior mining company operating complex projects, particularly on the timeline Claimant alleges in this arbitration to have been

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[33] Andrew T. Swarthout Bloomberg Profile, *available at* http://www.bloomberg.com/research/stocks/people/person.asp?personId=2334160&privcapId=2265062 (last visited April 12, 2016) (emphasis added) [Exhibit R-297].

[34] Claimant’s Reply at para. 8. Mr. Swarthout, Mr. Antunez de Mayolo, Mr. Kevin Morano, Mr. Richard J. Osborne, and Mr. Charles Smith all worked either for SPCC or its parent ASARCO.

[35] Swarthout First Witness Statement at para. 8.

[36] *See infra* at paras. 358-60.

[37] *See, e.g.*, “Tia Maria's Environmental Study Approval Causes Reaction in Peru,” *Americaexonomica* http://www.americaeconomia.com/negocios-industrias/rechazo-causa-aprobacion-de-estudio-ambiental-de-tia-maria-en-peru [Exhibit R-333]; “Protests in Perú Against Copper Mine Project Leaves One Dead,” *The Wall Street Journal, available at* http://www.wsj.com/articles/protests-in-peru-against-copper-mine-project-leaves-one-dead-1430862159 (last visited April 7, 2016) [Exhibit R-335].

[38] Second Witness Statement of Felipe A. Ramírez Delpino, April 4, 2016 (“Ramírez Second Witness Statement”), at paras. 44 [Exhibit RWS-006].

possible. Whether local communities grant a social license to a project or not—which is entirely separate from any governmental regulatory or permitting processes—will depend on the company's concerted and careful efforts to work with those communities. Such efforts are not a task for an inexperienced company that would dismiss community concerns as unjustified or its opponents as agitators. As will be discussed throughout this Rejoinder, Claimant's actions in relation to the Santa Ana Project do not indicate that it had the capacity to move a project forward to permitting, construction or operation in such a delicate environment. To the contrary, Claimant played a significant role in causing the widespread protests in Puno against the Santa Ana Project and against mining concessions more generally, and Claimant was nowhere near reaching the point where it could legally construct and operate a mine at either Santa Ana or Corani. No amount of prior experience in the field of mining *exploration* can brush those facts under the rug.

B. BEAR CREEK UNLAWFULLY ACQUIRED THE SANTA ANA CONCESSIONS

35. Respondent explained in its Counter-Memorial that Supreme Decree No. 032 was grounded in two elements: (i) Bear Creek's breach of Article 71 of the Peruvian Constitution, when it acquired the concessions for the Santa Ana Project indirectly through a Peruvian national (Jenny Karina Villavicencio) before obtaining a declaration of public necessity; and (ii) the social unrest that erupted in and paralyzed the Department of Puno, triggered significantly by Bear Creek's activities in the Santa Ana Project. In this Section, Respondent focuses on the first element—Bear Creek's violation of Article 71 of the Peruvian Constitution in the course of acquiring its claimed Santa Ana investment. (The history of the communities' protests is explored in Sections D.2 – D.4 that follow, before these two elements come back together in discussions of Supreme Decree No. 032 itself and related issues in Sections E – F.) .

36. Bear Creek would have this Tribunal believe that its scheme to obtain the Santa Ana concessions was normal and lawful. It was not. It is neither lawful nor common practice for a foreign company to acquire mining concessions in the border zone through a proxy (a Peruvian national) under its control before obtaining the constitutionally-required authorization of Perú's Council of Ministers. In its Counter-Memorial, Respondent explained in detail the legal framework applicable to Article 71 of the Peruvian Constitution.[39] Respondent will not reiterate that full explanation in this Rejoinder, but rather will focus on specific rebuttals to certain erroneous factual and legal arguments made by Claimant in its Reply. Respondent maintains and incorporates by reference the facts and arguments set forth in Section II.B of its Counter-Memorial[40] and expressly does not waive or concede any issue not directly addressed once again in this submission.

37. Fundamentally, Bear Creek misrepresents the legal framework of Perú's Constitution and mining laws and erroneously concludes that its actions were lawful. To counter those misrepresentations and the mistaken conclusion that follows from them, Respondent first explains the restriction that Article 71 of Perú's Constitution imposes on aliens with respect to their activities within the Peruvian border zones. Second, Respondent discusses Bear Creek's illegal scheme to circumvent that constitutional provision. Third, rebutting Bear Creek's allegation that its scheme was somehow necessary to secure the concessions against third parties, Respondent describes cases where foreign investors have successfully followed Constitutionally correct procedures, just as Bear Creek should have done, and distinguishes Claimant's profferred

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[39] *See* Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, October 6, 2015 ("Respondent's Counter-Memorial"), at Section II.B.

[40] *See* Respondent's Counter-Memorial at Section II.B.

counter-examples. Fourth, Respondent shows that Bear Creek's search for support for its circumvention of Perú's Constitution is unavailing.

1. Perú's Constitution Prohibits Any Direct *or Indirect* Acquisition of Mines Within 50 km of Perú's Borders

38. Perú's borders are constitutionally protected. The Peruvian Constitution carefully regulates property rights within the Peruvian border zones: aliens are free to obtain any type of property within Perú's territory, except within 50 km of Perú's borders.[41] Aliens are only *exceptionally* allowed to possess, directly or indirectly, certain property rights within Perú's borders zones if, and only if, the Council of Ministers, declares that possession to be a public necessity in a Supreme Decree.[42]

39. Article 71 of the Peruvian Constitution provides:

> [W]ithin a distance of fifty kilometers from the borders, aliens may not acquire or possess, directly or indirectly under any title, mines, land, woods, water, fuel or energy sources, whether it be individually or in partnership, under penalty of losing that so acquired right to the State. This restriction may be waived in case of public necessity expressly determined by an executive decree approved by the Council of Ministers in accordance with the law.[43]

40. Thus, aliens are prohibited from acquiring or possessing *directly or indirectly, under any title,* mines or land, among other resources in the border zone, unless they receive an express waiver from the highest body in the Executive Power, the Council of Ministers.

41. As Respondent demonstrates below, the Peruvian Constitution includes Article 71 in order to protect the Peruvian State's security (external and internal). Borders are sensitive

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[41] *See* Second Expert Report of Francisco Eguiguren Praeli, March 31, 2016 ("Eguiguren Second Report"), at para. 21 [Exhibit REX-007]; Expert Report of Jorge Danos Ordóñez, April 13, 2016 ("Danos Expert Report"), at paras. 7-8 [Exhibit REX-006].

[42] *See* Eguiguren Second Report at para. 21 [Exhibit REX-007]; Danos Expert Report at paras. 9, 26 [Exhibit REX-006].

[43] *See* Constitution of Peru, December 29, 1993 ("Constitution of Peru"), at Art. 71 [Exhibit R-001].

areas, and so Perú carefully controls whether to allow a foreigner to obtain any title to properties or natural resources within them. Because that control would be pointless if foreigners were able to covertly or remotely hold such interests without the State's approval, Article 71 prohibits not only direct but also indirect acquisition or possession of those interests. And that control is put in the hands of the highest executive body in Peru, which in a fully discretionary act may assess whether or not the presence of an alien within the Peruvian border zone is a "public necessity"—*i.e.* in the public interest of Peru.[44] When Bear Creek asked its employee and legal representative Ms. Villavicencio to serve as a front to acquire the concessions without first obtaining the Council of Ministers' consent, Bear Creek deprived the Peruvian State of its constitutional right and obligation to determine at that moment whether the company's presence in the border zone was a public necessity.

a. Article 71 of the Peruvian Constitution exists to protect Perú's external and internal national security

42. Since the 20th century Perú has expressly restricted foreigners' property rights within the country's border zones. Respondent's constitutional expert, Dr. Francisco Eguiguren, explained in his first expert report that provisions similar to Article 71 have existed in Perú's constitutions since 1920.[45] The main purpose of this provision is to allow the State to control, for security purposes, who owns and develops economic activities in the border zones. Dr. Eguiguren and Dr. Jorge Danos, Respondent's additional expert in constitutional and administrative Peruvian law, explain that national security is understood broadly, encompassing

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[44] *See* Eguiguren Second Report at paras. 27-30 [Exhibit REX-007]; Danos Expert Report at paras. 35-37 [Exhibit REX-006].

[45] *See* Expert Report of Francisco Eguiguren Praeli, October 6, 2015 ("Eguiguren First Report"), at paras. 13, 19 [Exhibit REX-001].

not only external but also internal threats to Perú's national security.[46] Perú has had a history of armed conflicts in which aliens resident in the border zones adversely affected Perú's ability to defend its borders. In the case of Puno, it is important to appreciate that the area is populated, in its majority, by Aymara indigenous communities that have an ethnic identity that spans both sides of Perú's border with Bolivia. The communities consider themselves to be Aymara first and foremost, and Peruvian only as a distant second formality. Therefore, any conflict in the region could affect both the security of the people of Puno and Perú's external security as well.

43. While Bear Creek agrees that it had to obtain a declaration of public necessity to acquire formal title to mining concessions within the border zones,[47] it tries to dismiss this requirement as outdated.[48] Bear Creek also claims that Article 71 relates only to a narrow concept of national security limited to Perú's ability to defend itself from foreign threats. In effect, Bear Creek tries to paint Article 71 as an anachronism or a dusty relic of times long past when the country feared foreign invasions, and it does so in the hopes of persuading the Tribunal that Article 71 is a mere technicality that can be ignored or circumvented if it proves inconvenient in these more modern times, and that any possible non-compliance with the Article is inconsequential and merits no more than a "tsk tsk" of disapproval. Bear Creek's interpretation is incorrect.

44. First, the Constitution's protection of Perú's border zones is not some curious historical artifact. Article 71 is a constitutional provision of great importance for Peru. As noted, it has been included in three successive iterations of the Constitution, dating back to

[46] *See* Eguiguren First Report at paras. 37-46 [Exhibit REX-001]; Eguiguren Second Report at para. 31 [Exhibit REX-007]; Danos Expert Report at paras. 10-13 [Exhibit REX-006].

[47] *See* Claimant's Reply at para. 17.

[48] *See* First Expert Report of Alfredo Bullard González, May 28, 2015 ("Bullard First Report"), at paras. 86-91, 93-95; *see also*. Claimant's Reply at para. 41.

1920—including the current Constitution, which was enacted in 1993, less than 25 years ago. Dr. Danos confirms that its inclusion in the 1993 Constitution was the result of explicit deliberations.[49] Moreover, it is a provision of continuing concern for Perú to this day. As just one example, Perú has ensured that this provision is respected by all of the countries with which it has negotiated trade and investment agreements. Every single one of Perú's Free Trade Agreements and Bilateral Investment Treaties signed in the past decade expressly designates Article 71 as a non-conforming measure that is carved out from the treaties' national treatment obligations.[50]

45. Moreover, the notion of national security protected by Article 71 is not limited to risks of foreign invasion. National security includes Perú's ability to protect itself from both foreign and internal threats. It is a concept that encompasses Perú's ability to maintain its internal order.[51] Dr. Danos explains in his expert report that Perú's Constitutional Tribunal (the highest court in Perú that can render authoritative interpretations of the Constitution) has interpreted the concept of national security as one that includes the defense against both internal and external

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[49] Danos Expert Report at para. 15 [Exhibit REX-006].

[50] *See* Agreement Between Canada and the Republic of Perú for the Promotion and Protection of Investments, June 20, 2007, at Annex 1-P-1[Exhibit C-0247]; Agreement Between the Government of the Republic of Perú and the Government of the Republic of Colombia for the Promotion and Protection of Investments, December 30, 2010, at Annex 1 [Exhibit R-386]; Agreement Between Japan and the Republic of Perú for the Promotion, Protection and Liberalization of Investment, December 10, 2009, at Art. 3 [Exhibit R-387]; Free Trade Agreement between Peru, Colombia and the EU, signed on June 26, 2012, June 1, 2003 (Excerpts), at Annex VII [Exhibit R-392]; Free Trade Agreement Between the Republic of Perú and Panama (Excerpts), May 1, 2012, at Annex I [Exhibit R-393]; Free Trade Agreement Between Costa Rica and the Republic of Perú (Excerpts), June 1, 2013, at Annex I [Exhibit R-394]; Free Trade Agreement Between the Republic of Perú and Mexico (Excerpts), February 1, 2012, at Annex I [Exhibit R-395]; Free Trade Agreement Between the Republic of Perú and Korea, signed on November 14, 2010 (Excerpts), August 1, 2011, at Annex I [Exhibit R-396]; Free Trade Agreement Between the Republic of Perú and the EFTA States (Excerpts), July 1, 2011, at Annex XI [Exhibit R-388]; Free Trade Agreement Between the Republic of Perú and the Peoples Republic of China (Excerpts), April 28, 2009, at Art. 130 [Exhibit R-389]; Free Trade Agreement Between Canada and the Republic of Perú (Excerpts), August 1, 2009, at Annex I [Exhibit R-390]; Free Trade Agreement Between the Republic of Perú and Singapore (Excerpts), February 1, 2009, at Annex 11B [Exhibit R-391].

[51] *See* Eguiguren Second Report at para. 31 [Exhibit REX-007]; Danos Expert Report at paras. 10-13 [Exhibit REX-006].

threats.[52] Moreover, even Bear Creek's own lawyers admit that Article 71 is intended to guarantee internal order. A memo prepared for Bear Creek by the firm of Rodrigo, Elias, & Medrano three months after Supreme Decree No. 032, which presumably was designed to put forward Bear Creek's best possible legal defense, nevertheless states, when describing the concept of national security in relation to Article 71 of the Peruvian Constitution, that "[t]he Regulations themselves definitively state that national security reasons are those required to guarantee: (i) the independence, (ii) the sovereignty and territorial integrity of the Republic, and (iii) *internal order*."[53] Thus, if the presence of an alien in the border zone of Perú adversely affects the internal order of Peru, that alien can surely be denied an exception from Article 71's prohibition on it acquiring rights in the border zone.

b. <u>According to Peruvian law, an indirect acquisition includes an acquisition through a third party front</u>

46. As just explained, Article 71 is intended to carefully regulate whether, when, and where a foreigner may acquire or possess property and natural resource rights within Perú's border zones. That careful regulation extends to both direct and indirect acquisition or possession of such rights, because the same risks to Perú's national security from a foreign presence in the border zone exist regardless of whether that presence is brought about directly or indirectly. Upon a foreigner's application, the highest Executive body of Perú analyzes if it is in the State's public interest—indeed, whether it is a "public necessity"—to have that foreigner own or possess property within the border zone, including indirectly.

[52] *See* Danos Expert Report at para. 13 [Exhibit REX-006].

[53] *See* Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Perú Branch, September 26, 2011 at p. 5 (emphasis added) [Exhibit C-0142].

47. Under Peruvian law, the concept of indirect property ownership includes an acquisition through a third party front.[54] Respondent's experts in Peruvian constitutional law explain in their reports that Article 71 includes a broad concept of indirect ownership.[55] The concept is not limited to indirect *corporate* ownership or control, such as between a parent company and a subsidiary,[56] as Bear Creek tries to suggest.[57] Commentators have explained that when a foreigner uses a front person who is a Peruvian national to obtain property within the border zone, it is considered to be an indirect ownership.[58] The situation is especially clear if this front person has a close relationship and is controlled by the foreigner, and deliberately obtains the property to save it for the foreigner—the foreigner has indirect or possession of the property in question. In such case, the foreigner has tried to circumvent, and thus has violated, Article 71 of the Peruvian Constitution.

48. Dr. Danos and Dr. Eguiguren explain that it would not be logical to restrict the concept of indirect property to that of indirect corporate ownership because Article 71's main purpose is to protect Peruvian borders from any undesired and unapproved foreign presence that could jeopardize Perú's national security.[59] Article 71 is intended to give the Council of Ministers an opportunity to decide whether or not is in Perú's public interest to allow aliens to own or possess some type of property in the border zones. Article 71's exercise of careful

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[54] *See* Eguiguren Second Report at paras. 42-43 [Exhibit REX-007]; Danos Expert Report at paras. 32-33 [Exhibit REX-006].

[55] *See* Eguiguren Second Report at paras. 42-43 [Exhibit REX-007]; Danos Expert Report at paras. 32-33 [Exhibit REX-006].

[56] *See* Eguiguren Second Report at paras. 42-43 [Exhibit REX-007]; Danos Expert Report at paras. 32-33 [Exhibit REX-006].

[57] *See for example* Claimant's Reply at para. 199.

[58] *See* Jorge Avendaño Valdez, "Foreigner's Restrictions and Equality on Property Matters, Commentaries on the Constitution, an Analysis Article by Article", at 948 [Exhibit R-303]; Eguiguren Second Report at paras. 42-43 [Exhibit REX-007]; Danos Expert Report at paras. 32-33 [Exhibit REX-006].

[59] *See* Eguiguren Second Report at para. 43 [Exhibit REX-007]; Danos Expert Report at para. 34 [Exhibit REX-006].

control over the border zone would be meaningless if it applied only to direct title holdings and allowed foreigners to covertly or remotely hold such interests without the Council of Ministers' consent. That is obviously why Article 71 restricts both direct and indirect foreign ownership within the border zone. And for the same reason, the term "indirect" must be given a broad reading; a narrow interpretation would undermine the purpose of Article 71 by creating a glaring loophole in the constitutional prohibition on unauthorized foreign control of border zone properties.

49. It is simple work to conclude that when a company (such as Bear Creek) directs a Peruvian citizen under its control (such as Ms. Villavicencio) to obtain a property right within the Peruvian border zones in order to save it for the company, without disclosing it to the State, and, that company has carried out an "indirect" acquisition of mineral rights in the border zone—which, without obtaining a proper authorization from the State, is a violation of Article 71.[60]

c. A declaration of public necessity is a discretionary act

50. It is also significant to note here—and for purposes of later discussion of the legality of Supreme Decree No. 32 in Section F.2 below—that a declaration of public necessity, which represents the State's grant of an exception from Article 71's prohibition on foreign possession of rights in the border zone, is a wholly discretionary sovereign act that is not granted automatically. Both Dr. Danos and Dr. Eguiguren agree: a declaration of public necessity is an exercise of the State's sovereign and discretionary power.[61] This express waiver can be granted only if the State determines that there is a public necessity that warrants the foreigner's presence in the border zone. Bear Creek mischaracterizes the legal nature of a declaration of public

[60] *See* Eguiguren Second Report at paras. 44-45 [Exhibit REX-007].

[61] *See* Eguiguren Second Report at paras. 21-33 [Exhibit REX-007]; Danos Expert Report at paras. 35-78 [Exhibit REX-006].

necessity,[62] apparently in the hopes of both downplaying its significance and imposing limitations on the conditions under which it can be denied (or revoked once granted). That effort is unsuccessful because its premise is defective—a Council of Ministers' declaration of public necessity by Supreme Decree is no mere administrative act.

51. First, Bear Creek alleges that the Council of Ministers is not free to take into consideration the full range of whatever elements it deems relevant when deciding whether or not to declare a particular border zone acquisition to be a public necessity.[63] According to Bear Creek, a declaration of public necessity may be denied only for reasons of external national security concerns.[64] Bear Creek's interpretation is incorrect.

52. The concept of public necessity is directly related to the welfare, not just the external security, of Perú and its citizens. A declaration of public necessity will only be issued if the government considers that the foreigner's presence in the border region will contribute to the development of the people in the region and the development of Peru, and in contrast will not cause conflicts or danger in the region.[65] It is in the plenary discretion of the Council of Ministers, informed by opinions of the Joint Chiefs of Staff and the Ministry of the sector involved (in this case, MINEM), to decide in favor or not of a foreigner's presence in the border zone. Dr. Eguiguren explains that it would have made no sense for the Constitution to charge such an important decision to the highest Executive body, the Council of Ministers, if the Council could not then exercise full discretion to determine whether or not a declaration of public necessity is warranted.[66] Therefore, a declaration of public necessity represents a

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[62] *See* Claimant's Reply at paras. 39-43.

[63] *See* Claimant's Reply at paras. 41-42.

[64] *See* Claimant's Reply at para. 41.

[65] *See* Eguiguren Second Report at para. 3 [Exhibit REX-007]; Danos Expert Report at para. 28 [Exhibit REX-006].

[66] *See* Eguiguren Second Report at para. 29.a [Exhibit REX-007].

sovereign, discretionary decision to grant an *exception* to Perú's Constitutional prohibition on direct or indirect foreign investment in owning any property (*i.e.* mines) in its border regions.[67]

53. Second, contrary to Claimant's contentions, just as the Peruvian government has full discretionary power to decide whether a foreign investment in the border zone is justified, if the reasons that justified such a declaration cease to exist, then the Government has the same broad discretionary power to re-examine the declaration of public necessity.[68] Bear Creek claims that the State may not revisit any declaration that has already been issued, principally because Bear Creek believes it to be an administrative act, for which reconsideration opportunities are constrained.[69] Claimant's expert, Mr. Hans Flury, goes as far as to say that the Council of Ministers does not have any authority to modify or repeal a declaration of public necessity.[70] This is untenable. Article 71 is intended to protect Perú's border zones from any external or internal threats. If a foreigner's presence in the border zone causes problems of internal order, the Council of Ministers has to have authority to revisit the declaration of public necessity.[71] Put another way, a declaration of public necessity will not be—and likewise, will not continue to be—justified if the foreigner's ownership, instead of promoting development and welfare in the region, causes conflicts and social crisis.

54. Third, Bear Creek alleges that the declaration of public necessity is an administrative act, and that it is therefore governed by administrative law.[72] In particular, Bear

[67] *See* Eguiguren Second Report at paras. 25-36 [Exhibit REX-007].

[68] *See* Eguiguren Second Report at para. 65 [Exhibit REX-007]; Danos Expert Report at para. 124 [Exhibit REX-006].

[69] *See* Claimant's Reply at para. 43.

[70] *See* Expert Report of Hans A. Flury, January 5, 2016 ("Flury Report"), at para. 35.

[71] *See* Eguiguren Second Report at para. 65 [Exhibit REX-007]; Danos Expert Report at para. 124 [Exhibit REX-006].

[72] *See* Claimant's Reply at paras. 39-43.

Creek and its Peruvian law expert Dr. Bullard claim that because the procedure that a foreign applicant should follow to obtain a declaration of public necessity appears in a *Texto Unificado de Procedimientos Administrativos* (Unified Text of Administrative Proceedings—or "TUPA" by its Spanish acronym), the declaration is an administrative act.[73] That conclusion is incorrect. A TUPA is a compilation, for the convenience of those dealing with a given public entity, of the procedures that can be carried out before that public entity (in this case, MINEM).[74] But, as Dr. Eguiguren and Dr. Danos explain, the fact that a procedure is included in a ministry's TUPA does not tell one anything about the legal nature of the act that results from the listed procedure.[75]

55. In sum, a declaration of public necessity is a plenary exercise of the State's sovereign and discretionary power, not a narrowly constrained, mechanical administrative act.

2. Bear Creek Violated Article 71 of the Peruvian Constitution

56. Ms. Jenny Karina Villavicencio was a front for Bear Creek's indirect acquisition of the Santa Ana concessions. Evidence on the record shows that Bear Creek indirectly acquired the Santa Ana concessions before obtaining the declaration of public necessity—thereby violating Article 71 of the Peruvian Constitution. Bear Creek, on the other hand, insists that it did not violate Article 71 because it did not acquire any formal property rights (titles) before Supreme Decree No. 083 was issued and because Ms. Jenny Karina Villavicencio allegedly acted freely.[76] Bear Creek also claims that any time it performed activities connected to the concessions (such as signing land use agreements with the local communities) during the period

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[73] *See* Claimant's Reply at paras. 39-40.

[74] *See* Eguiguren Second Report at para. 26 [Exhibit REX-007]; Danos Expert Report at para. 71-72 [Exhibit REX-006].

[75] *See* Eguiguren Second Report at para. 26 [Exhibit REX-007]; Danos Expert Report at para. 71 [Exhibit REX-006].

[76] *See* Claimant's Reply at para. 21.

of Ms. Villavicencio's nominal ownership, it was merely acting "on behalf and for the benefit of" Ms. Villavicencio.[77] But Bear Creek's story fails for several reasons.

57. First, Ms. Villavicencio was never free to dispose of the concessions without the express consent of Bear Creek. Bear Creek argues that it did not indirectly acquire the Santa Ana concessions through Ms. Villavicencio because Ms. Villavicencio alone formally owned (held titles to) the concessions, and it claims that she was free to dispose of them if she so desired.[78] This is incorrect. As told by Claimant itself, in 2004, Bear Creek's geologist, Mr. César Ríos, identified potential silver deposits in the South of the Puno Department, within the 50 km of the border with Bolivia.[79] Bear Creek decided that it wished to explore, and perhaps eventually exploit these deposits, but it realized that it would need to request and obtain a declaration of public necessity because of where the potential silver deposits were located near the Bolivian border. Therefore, Mr. Rios (as instructed by Mr. Swarthout) discussed the strategy to secure the mining concessions for that area with Bear Creek's employee Ms. Jenny Karina Villavicencio: She would apply for and obtain the concessions that Bear Creek identified, and while Bear Creek applied for and obtained the declaration of public necessity, Bear Creek and Ms. Villavicencio would sign option contracts with respect to the concessions. As will be discussed later, the language and terms of the option contracts shed light on the restrictive relations between Ms. Villavicencio and Bear Creek. At that time, Ms. Villavicencio was a representative and employee of Bear Creek.[80]

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[77] *See* Claimant's Reply at para. 29.

[78] *See* Claimant's Reply at para. 21.

[79] *See* Claimant's Memorial at para. 25.

[80] *See* Claimant's Memorial at para. 25; Claimant's Reply at paras. 18, 25.

58. As agreed with Bear Creek, Ms. Villavicencio applied for the specified concessions on May 26, 2004 and November 29, 2004.[81] When applying for the concessions, Ms. Villavicencio used the address (Av. Santa Maria 140, Miraflores, Lima) of Bear Creek's law firm, Estudio Grau. Dr. Miguel Grau, the firm's leader and Bear Creek's lawyer, has been a general legal representative of Bear Creek Mining Corporation since 2000 and is currently a director on the company's Board.[82] But, more importantly, Ms. Villavicencio did not disclose to the INGEMMET (the entity that administers the issuance of mining concessions in Peru) any oral or written agreements with Bear Creek, or that she was Bear Creek's representative and employee, or that she was applying for the concessions at Bear Creek's direction. Ms. Villavicencio obtained title to the concessions in mid-2006.

59. Shortly after Ms. Villavicencio applied for the mining concessions, and well before the INGEMMET awarded her titles over them, she signed two option contracts with Bear Creek on November 7, 2004 and December 5, 2004.[83] These contracts provided that if Bear Creek obtained the declaration of public necessity under Article 71, it could exercise the option to acquire the mining concessions from Ms. Villavicencio. Notably, Ms. Villavicencio was bound by the terms of the option contracts long before (nearly a year and a half before) she acquired title over the concessions.

60. Ms. Villavicencio never possessed an unencumbered right to the concessions—she acquired the concessions only *after* she had sold the option to the concessions to Bear Creek.

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[81] *See* Claimant's Memorial at paras. 25-27.

[82] Bear Creek Mining Corporation List of Board of Directors, *available at* http://www.bearcreekmining.com/s/directors.asp (last visited April 11, 2016) [Exhibit R-380]; Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, December 4, 2006, at pp. 41-43[Exhibit C-0017].

[83] *See* Claimant's Memorial at para. 28; Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006 [Exhibit R-007].

She never had any ability to sell the concessions to an unrelated third party while Bear Creek was in the process of applying for the Supreme Decree. The option contracts' terms illustrate that Ms. Villavicencio was only a front person for Bear Creek's acquisition. According to the option contracts, Ms. Villavicencio had the obligation to hold open an exclusive offer to transfer the concessions to Bear Creek for a term of 60 months.[84] Bear Creek, by contrast, had the power to exercise or terminate the option at any time during those 60 months.[85] In other words, Bear Creek could decide that if the exploration was successful (and it managed to obtain a declaration of public necessity), then it would exercise its option; but if the exploration was unsuccessful, then Bear Creek was equally free to terminate the option because the concessions would be useless. In return for these five years of rather unbalanced rights, Bear Creek agreed to pay Ms. Villavicencio nothing at the time that she entered into the agreement, and a total sum of $14,000 only if it opted to exercise the option—for a project whose value Bear Creek now sets at $224 million. It is true that if the exploration was successful, but Bear Creek failed to get the Supreme Decree, then Ms. Villavicencio could sell the concessions—but she could do so only after the full 60 month term had elapsed. In sum, Bear Creek had full control over what Ms. Villavicencio could do with the concessions as of the time she obtained them. To be clear, Respondent does not claim that option contracts *per se* violate Article 71, or that these particular option contracts (alone and on their faces) would violate Article 71, as Claimant's experts seem to have

[84] Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004, at Section 2 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006, at Section 2 [Exhibit R-007].

[85] Option Contract for the Transfer of Mineral Rights No. 3,512, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, November 17, 2004, at Section 2 [Exhibit R-006]; Option Contract for the Transfer of Mineral Rights No. 4,383, Between Jenny Karina Villavicencio Gardini and Bear Creek Mining Company, Sucursal del Perú, September 5, 2006, at Section 2 [Exhibit R-007].

misunderstood.[86] Such contracts with an arms-length third party would likely be no problem at all. But these option contracts, however, were part of Bear Creek's scheme to indirectly own and control the concessions.

61. In an audacious move, Bear Creek contends that Ms. Villavicencio was the sole owner of the mining concessions, and that any time it performed activities in relation to the concessions (such as signing land use agreements with the local communities), it was merely acting "on behalf and for the benefit of" Ms. Villavicencio.[87] As Dr. Danos points out, however, there cannot be any real doubt that Bear Creek undertook those activities for its own benefit, not for her benefit.[88]

62. Bear Creek criticizes Perú for positing that Bear Creek had Ms. Villavicencio apply for the concessions in order to be able to start exploration activities as early as possible, rather than waiting to obtain the declaration of public necessity.[89] But that is indeed what happened. Ms. Villavicencio obtained the first titles over the concessions in mid-2006 and then exploration activities in the Santa Ana concessions started immediately thereafter, in July 2006.[90] Had Bear Creek not used the scheme of indirectly acquiring the concessions through Ms. Villavicencio, it would have had to wait until after November 2007, when Supreme Decree No. 083 was issued, to start that work.

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[86] *See* Claimant's Reply at para. 28; Second Expert Report of Alfredo Bullard González, January 6, 2016 ("Bullard Second Report"), at paras. 20, 52-56, 60; Flury Report at para. 59.

[87] *See* Claimant's Reply at para. 29.

[88] Danos Expert Report at para. 90 [Exhibit REX-006].

[89] *See* Claimant's Reply at para. 29.

[90] *See* Claimant's Memorial at paras. 26-27; Directorial Resolution Granting KARINA 1 Mining Concession to Jenny Villavicencio, Directorial Resolution No. 1856-2006-INACC/J, April 28, 2006 [Exhibit R-276]; Directorial Resolution Granting KARINA 9A Mining Concession to Jenny Villavicencio, Directorial Resolution No. 2459-2006-INACC/J, June 13, 2006 [Exhibit R-277].

63. Respondent's mining law expert, Dr. Rodríguez-Maríategui, explains that the language in the option contracts also shows that Bear Creek had control over Ms. Villavicencio and over the activities related to the mining concessions.[91] Dr. Rodríguez-Mariáteguiexplains that had the option contracts been signed between two unrelated parties, the company would have signed additional agreements with the concession owner to set out the terms for the exploratory work.[92] Ordinarily, if it wants to explore mining concessions owned by a third party, the mining company will enter into agreements (or include terms in its option contracts) to allow the company to conduct exploration activities on the existing concessionaire's concessions. Bear Creek does not appear to have done so (or at least has not presented any such contracts to the Tribunal). The absence of any formal agreement setting out the terms for Bear Creek's exploration activities, which arms-length parties would insist upon to regulate those activities, suggests that Bear Creek exercised such control over Ms. Villavicencio and the exploratory process that it saw no need to document any arrangements with her.[93]

64. As the nominal title holder to the concessions, Ms. Villavicencio applied to MINEM to initiate exploration activities on June 9, 2006.[94] It is uncontested that Ms. Villavicencio had no mining experience that would allow her to actually conduct these activities. It was Bear Creek who would actually perform these activities and who would talk directly to the local communities to seek permission to carry them out. For example, Mr. Swarthout signed a land use agreement with the Community Condor de Ancocahua in May 2006. Bear Creek accuses Perú of misrepresenting the facts of that agreement because Mr. Swarthout was allegedly

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[91] *See* Second Expert Report of Luis Rodríguez-Mariátegui Canny, March 31, 2016 ("Rodríguez-Mariátegui Second Report"), at paras. 71-72 [Exhibit REX-009].

[92] *See* Rodríguez-Mariátegui Second Report at paras. 71-72 [Exhibit REX-009].

[93] *See* Rodríguez-Mariátegui Second Report at paras. 71, 73 [Exhibit REX-009].

[94] *See* Resolution Approving Ms. Villavicencio's Sworn Declaration, Directorial Resolution No. 256-2006-MEM/AAM, July 11, 2006 [R-034].

acting "on behalf and for the benefit of Ms. Villavicencio."[95] But a careful review of the text of the agreement shows that the local community would have understood that it was contracting with the company, not with Ms. Villavicencio.

65. First, according to the minute (*acta*) that contains the agreement, at the meeting where the agreement was approved there were four high-level representatives of Bear Creek present: Mr. Andrew Swarthout (CEO of the company), Mr. Chafika Eddine (Vice-president of Corporate Relations), and Messrs. Jorge Aguilar Gómez and Paulino Maquera (Coordinators of Community Relations).[96] Such a heavy presence of the company indicates that they were not acting on behalf of Peruvian citizen, Ms. Villavicencio, but that the company was the one obtaining the agreement. Second, while the introductory "considerations" of the minute do state that Mr. Swarthout was representing Ms. Villavicencio, the introductory "considerations" also provide that the community agreed to "grant the permits *to the Company* in order to initiate Exploration Studies. . . ."[97] Third, as Respondent noted in its Counter-Memorial, Mr. Swarthout also represented that the company was the owner of the mining concessions. Section Two of the minute provides "*[t]he Company represents that it is the owner* of the Karina, Karina 1, Karina 2 Mining Concessions where the Exploration Studies will commence. . . ."[98] That representation by Mr. Swarthout is striking because he represented that the company owned the concessions before Bear Creek had even applied for a declaration of public necessity. Fourth, Section Three of the minute provides that "[t]he Community . . . agreed to give permit *to the aforesaid Company* to

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[95] *See* Claimant's Reply at para. 30.

[96] Agreements Between Bear Creek and Local Communities, May 2006, at p. 134 [Exhibit R-043]. (emphasis added).

[97] Agreements Between Bear Creek and Local Communities, May 2006, at p. 134 [Exhibit R-043]. (emphasis added).

[98] Agreements Between Bear Creek and Local Communities, May 2006, at p. 134, Section 2 [Exhibit R-043]. (emphasis added).

initiate the Exploration Studies."[99] Fifth, Section Five of the minute provides that "[t]he parcel owners agree to provide support *to the Company* in the development of Exploration activities."[100] Thus, contrary to what Mr. Swarthout now declares, he did represent to the communities that Bear Creek was the owner of the concessions and their true counter-party in the transaction. Moreover, this agreement shows that Bear Creek was the one conducting the exploration activities on the concessions, well prior to its application for the declaration of public necessity.

66. Bear Creek alleges that the facts now described by Respondent with respect to the Condor de Ancocahua land use agreement were not of great import to the government at that time. According to Claimant, Perú was fully aware of this agreement, as well as of the fact that Bear Creek was paying all of the sub-surface mining fees that were nominally owed by Ms. Villavencio as the title-holder of the concessions.[101] However, as with Bear Creek's other claims about MINEM's "knowledge" discussed below, that claim does not hold up as a matter of practical reality. MINEM may have received these disparate pieces of information. But the information was given in separate bits and pieces to separate entities or divisions within MINEM. No one official knew the full extent of Bear Creek's relations and agreements with Ms. Villavicencio.

67. Bear Creek applied for the public necessity declaration on December 5, 2006—more than two years after Ms. Villavicencio applied for the concessions. Bear Creek alleges that in its public necessity application it disclosed all the relevant information to MINEM, including

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[99] Agreements Between Bear Creek and Local Communities, May 2006, at p. 134, Section 3 [Exhibit R-043]. (emphasis added).

[100] Agreements Between Bear Creek and Local Communities, May 2006, at p. 135, Section 5 [Exhibit R-043]. (emphasis added).

[101] *See* Claimant's Reply at paras. 31-32.

that Ms. Villavicencio was the owner of the concessions, and that Bear Creek had entered into option agreements with her to obtain the concessions.[102] Bear Creek claims that the Government was also fully aware of its relationship with Ms. Villavicencio, and that the Government may not now claim that Bear Creek violated the Peruvian constitution. And, in recent letters to this Tribunal (not in its Reply on the Merits), Bear Creek further suggested that MINEM should have known that Ms. Villavicencio was Bear Creek's employee because the full list of employees in a company in Perú is regularly reported to the Ministry of Labor.[103] Claimant mischaracterizes the information that had been provided to the Government and takes it out of context.

68. First, Bear Creek did not disclose the full extent of its relationship with Ms. Villavicencio to MINEM when it applied for the declaration of public necessity. Bear Creek never disclosed to MINEM that Ms. Villavicencio was an employee of the company at that time. Only by connecting disparate dots in Bear Creek's supreme decree application and Ms. Villavicencio's concession applications does *part* of the relationship between Bear Creek and Jenny arise—a single piece of paper buried on page 83 of some 200 pages of the application showed that she was a legal representative of Bear Creek in limited matters—but *not* that she was an employee.

69. MINEM did not know, and Claimant has presented no documentation that any one at MINEM did know or should have known, that Ms. Villavicencio was an employee of Bear Creek when she acquired the mining concessions, when she agreed to convey an option in those concessions to Bear Creek, and when Bear Creek applied to the Government for a Supreme Decree that would allow Bear Creek to acquire the concessions in its own name. There is no evidence on the record that suggests that Ms. Villavicencio disclosed to the Government in 2004

[102] *See* Claimant's Reply at paras. 18, 35.

[103] Letter from Claimant to Tribunal, March 7, 2016, at p. 4 [Exhibit R-385].

when she applied for the Santa Ana concessions that she was acquiring them at the instructions of and on behalf of her employer Bear Creek, or that Bear Creek disclosed when it applied for the Supreme Decree in 2006 that it intended to acquire the concessions from its employee Ms. Villavicencio, who had only acquired the concessions at Bear Creek's bidding. Bear Creek has not only not presented any evidence, but has also declined to provide any testimony from Ms. Villavicencio at all, nor in particular any testimony that could suggest that she had the funding, experience, or skills needed to do anything with the concessions herself.

70. Second, the information that Bear Creek did provide to MINEM in its declaration of public necessity would not have informed the Government of the real extent of its relation with Ms. Villavicencio. Bear Creek provided two documents: the option contracts, and a one-page registry document that stated that Ms. Villavicencio was a legal representative of the company for financial purposes.[104] These documents were scattered in a 200 page application and Bear Creek made no effort to direct MINEM's officials to them, in particular to the registry document. In any case, none of these documents informed the Government of the facts that Bear Creek now so candidly admits: that it was Bear Creek who asked Ms. Villavicencio, its employee, to obtain the concessions and to keep them for the company, supposedly in order to avoid a risk of a third party obtaining property over the concessions—in other words, that Bear Creek had acquired the concessions indirectly when Ms. Villavicencio acquired them. As Mr. Cesar Zegarra, Legal Director of MINEM, explains in his witness statement, when MINEM reviews an application, its staff proceeds on the assumption that the applicant is acting in good faith; it does not scour the application or consult external sources (such as the Ministry of Labor) in a search for possible Article 71 violations. With the information Bear Creek provided, none of

[104] *See* Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, December 4, 2006, at pp. 80, 165-188 [Exhibit C-0017].

the government officials that reviewed the application could have been expected to conclude that Bear Creek had violated Article 71 of the Peruvian Constitution. Thus, contrary to Bear Creek's allegations, the officials were not provided with enough elements to question the relationship between Ms. Villavicencio and the company.[105]

71. Bear Creek alleges that the reason it asked Ms. Villavicencio to apply for the concessions and to enter into an option contract with the company was because of a "potential risk that others interested in acquiring concessions would interfere" in the application process.[106] As Respondent explained in its Counter-Memorial and will revisit again in the next section, there was no such risk. Bear Creek could have and should have applied directly for the concessions, and there was no need to use the artifice of Ms. Villavicencio to secure the concessions for itself.

72. In addition, Bear Creek's candid (if misguided) explanation that it used Ms. Villavicencio to reduce a perceived risk of losing the concessions to third parties shows again that Ms. Villavicencio was used solely as a front person, and that Bear Creek had full control over the concessions before obtaining a declaration of public necessity. Mr. Swarthout explained in his witness statement that a solution to their problem with the Santa Ana concessions (*i.e.* the risk of losing the concessions to third parties) was to "identify a trustworthy Peruvian citizen or company interested in applying for mineral concessions in Santa Ana and entering into an option agreement."[107] Bear Creek chose Ms. Villavicencio, because the company knew she was "trustworthy." And why was that? Self-evidently, because she was their employee and under their control.

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[105] *See* Claimant's Reply at para. 36.

[106] *See* Claimant's Reply at para. 24; *see also* Second Witness Statement of Andrew T. Swarthout, January 6, 2016 ("Swarthout Second Witness Statement"), at para. 14.

[107] Swarthout First Witness Statement at para. 17.

73. On these bases, Dr. Eguiguren, Respondent's constitutional expert, and Dr. Danos, Respondent's constitutional and administrative law expert, both conclude that Bear Creek violated Article 71 of the Peruvian Constitution.[108] Article 71 is intended to give the highest Executive body an opportunity to review and approve a foreigner's ownership or possession of, including indirect interests in, property and natural resources in the border zones of Peru. Bear Creek deprived the Council of Ministers of the opportunity to conduct that review at the time Bear Creek acquired the mining concessions through a front person.[109] Dr. Eguiguren explains that, had Bear Creek had an arm's length relation with Ms. Villavicencio, the arrangement presumably would not have been a constitutional violation.[110] But, because Bear Creek had deliberately asked Ms. Villavicencio to obtain the concessions and to keep them for the company, and because the company had full control over Ms. Villavicencio's actions with respect to the concessions, there was no arm's length transaction—Bear Creek indirectly acquired and possessed the concessions in violation of Article 71 of the Constitution.[111]

3. Foreign Investors in Perú's Border Zones Successfully Follow Proper Procedures under Article 71, and Bear Creek's Purported Counter-Examples Are Not Comparable

74. Claimant contends that Bear Creek's strategy to acquire the mining concessions through Ms. Villavicencio was necessary to secure priority over the concessions against third parties who might try to intervene, and that it was a lawful and a normal practice in the Peruvian mining industry.[112] Neither proposition is true.

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[108] *See* Eguiguren Second Report at paras. 39-63 [Exhibit REX-007]; Danos Expert Report at paras. 85-97 [Exhibit REX-006].

[109] *See* Eguiguren Second Report at para. 42-43, 45 [Exhibit REX-007]; Danos Expert Report at para. 91 [Exhibit REX-006].

[110] *See* Eguiguren Second Report at para. 44 [Exhibit REX-007].

[111] *See* Eguiguren Second Report at para. 45 [Exhibit REX-007].

[112] *See* Claimant's Reply at paras. 24, 45.

75. As discussed in part (a) of this Section, Bear Creek would not have run any risk of losing priority over the concessions if it had it acted properly to acquire them. And that is not just an abstract legal proposition; it is borne out in practice as well. Respondent submits seven examples where foreign nationals did use a constitutionally appropriate process to acquire some 30 mining concessions in the border zone. As Bear Creek should have done, these foreign companies applied directly to INGEMMET for the mining concessions in order to secure their priority over the concessions; INGEMMET then temporarily suspended the application process while the companies applied for and obtained the required declaration of public necessity; and once they had obtained their declarations, the companies were granted the mining concessions. These cases demonstrate that Bear Creek's alleged risk of losing the concessions to third parties had they applied themselves did not exist and could not justify, even in practical terms, the company's circumvention of Article 71 of the Constitution.

76. As discussed in part (b) of this Section, Bear Creek nevertheless attempts to validate its unlawful scheme by claiming that other foreign investors have used transaction structures similar to Bear Creek's to acquire mining concessions in the border zone, and that those structures were blessed by the Peruvian government.[113] Bear Creek submits four examples that are supposedly similar to its case. In two of them the foreign investor acquired the mining concessions indirectly prior to obtaining the declaration of public necessity.[114] In the other two cases, the foreign investors allegedly used a front person (Peruvian national) to circumvent Article 71 and acquire the concession for the benefit of a foreigner prior to obtaining a

[113] *See* Claimant's Reply at para. 46.

[114] *See* Claimant's Reply at paras. 47-59.

declaration of public necessity.[115] In part (b) below, Respondent analyzes each of these cases and shows that none of them are comparable to Bear Creek's case.

a. Several companies have taken precisely the path that Perú suggests, thereby refuting Bear Creek's argument that violating the Constitution was the only way to preserve its interest in the discovered mineral deposits

77. MINEM's Legal Director, Dr. Zegarra, and Respondent's mining law expert, Dr. Rodríguez-Mariáteguihave explained that, under Peruvian law, there is nothing that prohibited Bear Creek from applying to the mining concessions directly, before obtaining a declaration of public necessity.[116] Bear Creek could have applied directly to the INGEMMET for the concessions, and INGEMMET would have suspended the proceeding to obtain the concessions, until Bear Creek acquired the declaration of public necessity. In contrast, the Peruvian Constitution prohibits the path that Bear Creek took instead—the indirect acquisition of mines (including through a front person, such as Ms. Villavicencio) without first obtaining a public necessity declaration.

78. Claimant's expert, Mr. Flury, contends that, had Bear Creek applied directly to INGEMMET for the concessions, it would have had only seven months to receive the Supreme Decree or else another party could have nullified the application and taken the concessions.[117] Dr. Rodríguez-Mariáteguiexplains in his report that Mr. Flury's conclusions are without merit. INGEMMET has had a constant practice of reserving the concessions for a foreigner that applies for them directly, giving the foreigner priority but setting the application aside until the foreigner

[115] *See* Claimant's Reply at paras. 60-64.

[116] *See* Second Witness Statement of César Zegarra, April 8, 2016 ("Zegarra Second Witness Statement"), at para. 10 [Exhibit RWS-007]; Rodríguez-Mariátegui Second Report at paras. 22-24 [Exhibit REX-009].

[117] *See* Claimant's Reply at para. 25; *see also* Flury Report at para. 43, 46-47.

applies for and obtains the required declaration of public necessity.[118] Moreover, Dr. Rodríguez-Mariáteguiexplains that this practice was codified, consistent with prior practice, in 2001 in the Mining Regulation, which provides that a petition to obtain a mining concession may only be denied to a foreigner if its application for a declaration of public necessity has been denied.[119] While the application is pending, it is only the petitioner (in this hypothetical case, Bear Creek) who can decide to withdraw the application. INGEMMET cannot declare the application denied as long as the application for the declaration of public necessity is pending. Thus, Bear Creek had no reason to use Ms. Villavicencio to apply for the concessions, as there was never a risk of losing priority over the concessions to a third party.

79. As examples, Dr. Rodríguez-Mariáteguidiscusses in his expert report seven cases in which the foreign companies did follow a lawful procedure to acquire some 30 mining concessions in the border zone, without using deceptive schemes to circumvent Article 71. Like the Santa Ana Project concessions, all of these cases involved "free" land—that is, areas in which concessions that had not yet been granted to a private party, and thus the concessions were available to the first person or entity who might apply to INGEMMET for them.

80. In these cases, foreigners applied directly for the concessions, without acting through a front person, contrary to Bear Creek's scheme. None of these companies encountered any of the problems or risks of which Bear Creek claims justified its use of Ms. Villavicencio. When these foreign companies applied for the mining concessions, the INGEMMET (formerly INACC-National Institute of Cadastre and Mining Concessions) temporarily suspended the petitioning process and reserved concessions for the foreign companies while they applied for

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[118] *See* Zegarra Second Witness Statement at para. 12 [Exhibit RWS-007]; Rodríguez-Mariátegui Second Report at para. 24 [Exhibit REX-009].

[119] *See* Rodríguez-Mariátegui Second Report at para. 27 [Exhibit REX-009].

and obtained the declaration of public necessity. Once the INACC / INGEMMET learned that a supreme decree declaring the public necessity had been issued, it proceeded with the procedure for granting titles over the mining concessions to the original applicant foreign companies.[120]

81. The following table lists the seven examples discussed by Dr. Rodríguez-Mariáteguishowing that the foreign company applied directly for the concessions, before obtaining a declaration of public necessity, and then continuing with the process of obtaining the mining concessions after having received the proper authorization.[121]

COMPANY	CONCESSION	REQUEST CONCESSION	REQUEST S.D.	ISSUANCE S.D.	MINING CONCESSION
Compañía Minera LJB Normandy S.A. (D.S. No. 017-2002-EM[122])	Laumache 1	30-Jan-01	26-Sep-01	3-May-02	10-Jul-02
	Laumache 2	30-Jan-01	26-Sep-01	3-May-02	10-Jul-02
	Laumache 3	29-May-01	26-Sep-01	3-May-02	10-Jul-02
	Laumache 4	29-May-01	26-Sep-01	3-May-02	5-Jul-02
	Laumache 5	29-May-01	26-Sep-01	3-May-02	10-Jul-02
	Laumache 6	29-May-01	26-Sep-01	3-May-02	12-Apr-04
	Laumache 7	29-May-01	26-Sep-01	3-May-02	12-Apr-04
Newmont Perú Ltd. Suc. Perú (D.S. No. 014-2005-EM[123] / D.S. No. 040-	Ayahuanca 417	5-May-03	18-Aug-03	22-Apr-05	15-Jul-05
	Ayahuanca 418	5-May-03	18-Aug-03	22-Apr-05	28-Jun-05
	Ayahuanca 419	5-May-03	18-Aug-03	22-Apr-05	18-Jul-05

[120] *See* Rodríguez-Mariátegui Second Report at para. 58 [Exhibit REX-009].

[121] *See* Rodríguez-Mariátegui Second Report at para. 59 [Exhibit REX-009].

[122] *See* Laumache 1 Mining Title File (Excerpts) [Exhibit R-241]; Laumache 2 Mining Title File (Excerpts) [Exhibit R-242]; Laumache 3 Mining Title File (Excerpts) [Exhibit R-243]; Laumache 4 Mining Title File (Excerpts) [Exhibit R-244]; Laumache 5 Mining Title File (Excerpts) [Exhibit R-245]; Laumache 6 Mining Title File (Excerpts) [Exhibit R-246]; Laumache 7 Mining Title File (Excerpts) [Exhibit R-247].

[123] *See* Ayahuanca 417 Mining Title File (Excerpts) [Exhibit R-248]; Ayahuanca 418 Mining Title File (Excerpts) [Exhibit R-249]; Ayahuanca 419 Mining Title File (Excerpts) [Exhibit R-250]; Ayahuanca 420 Mining Title File (Excerpts) [Exhibit R-251].

2007-EM[124])	Ayahuanca 420	5-May-03	18-Aug-03	22-Apr-05	12-Jul-05
	Ayahuanca 478	3-Jan-06	02-Mar-2006	19-Jul-07	7-Mar-08
	Ayahuanca 479	3-Jan-06	02-Mar-2006	19-Jul-07	7-Mar-08
	Ayahuanca 480	3-Jan-06	02-Mar-2006	19-Jul-07	12-May-08
	Ayahuanca 481	3-Jan-06	02-Mar-2006	19-Jul-07	12-May-08
Newcrest Resources Inc. - Suc Perú (D.S. No. 032-2008-EM[125])	Quilavira 1	29-Sep-06	15-Nov-06	14-Jun-08	20-Oct-08
	Quilavira 2	29-Sep-06	15-Nov-06	14-Jun-08	19-Nov-08
	Quilavira 3	29-Sep-06	15-Nov-06	14-Jun-08	20-Oct-08
	Quilavira 4	12-Dec-06	15-Nov-06	14-Jun-08	19-Nov-08
	Quilavira 5	12-Dec-06	15-Nov-06	14-Jun-08	18-Dec-08
	Quilavira 6	12-Dec-06	15-Nov-06	14-Jun-08	16-Mar-09
Minera Goldfields Perú S.A. (D.S. No. 012-2009-EM[126])	Jaruma 1	27-May-08	07-Jul-08	13-Feb-09	17-Aug-09
	Jaruma 2	27-May-08	07-Jul-08	13-Feb-09	11-Jan-11
	Jaruma 3	27-May-08	07-Jul-08	13-Feb-09	N/A[127]
	Jaruma 4	27-May-08	07-Jul-08	13-Feb-09	N/A[128]
	Jaruma 5	19-Jun-08	07-Jul-08	13-Feb-09	N/A[129]
Energy Resources &	Laksmi VI	24-Apr-09	16-Jul-09	4-Dec-09	18-Jan-10

[124] *See* Ayahuanca 478 Mining Title File (Excerpts) [Exhibit R-252]; Ayahuanca 479 Mining Title File (Excerpts) [Exhibit R-253]; Ayahuanca 480 Mining Title File (Excerpts) [Exhibit R-254]; Ayahuanca 481 Mining Title File (Excerpts) [Exhibit R-255].

[125] *See* Quilavira 1 Mining Title File (Excerpts) [Exhibit R-256]; Quilavira 2 Mining Title File (Excerpts) [Exhibit R-257]; Quilavira 3 Mining Title File (Excerpts) [Exhibit R-258]; Quilavira 4 Mining Title File (Excerpts) [Exhibit R-259]; Quilavira 5 Mining Title File (Excerpts) [Exhibit R-260]; Quilavira 6 Mining Title File (Excerpts) [Exhibit R-261].

[126] *See* Jaruma 1 Mining Title File (Excerpts) [Exhibit R-262]; Jaruma 2 Mining Title File (Excerpts) [Exhibit R-263]; Jaruma 3 Mining Title File (Excerpts) [Exhibit R-264]; Jaruma 4 Mining Title File (Excerpts) [Exhibit R-265]; Jaruma 5 Mining Title File (Excerpts) [Exhibit R-266].

[127] El título minero para la concesión Jaruma 3, no fue otorgado por encontrarse en áreas protegidas. *Véase* Expediente del Título Minero Jaruma 3 (extractos) [Anexo R-264].

[128] El título minero para la concesión Jaruma 4 no fue otorgado por encontrarse en áreas protegidas. *Véase* Expediente del Título Minero Jaruma 4 (extractos) [Anexo R-265].

[129] El título minero para la concesión Jaruma 5 no fue otorgado por encontrarse en áreas protegidas. *Véase* Expediente del Título Minero Jaruma 5 (extractos) [Anexo R-266].

Electrical Power S.A.C. (D.S. No. 085-2009-EM[130])					
Solex del Perú S.A.C. (D.S. No. 063-2008-EM[131])	Angostura	17-May-06	23-Mar-07	25-Dec-08	16-Mar-11
	Pucará	17-May-06	23-Mar-07	25-Dec-08	16-Oct-09
Empresa Minera Los Quenuales S.A. (D.S. No. 013-2009-EM[132])	Yauliyacu 42	29-Aug-07	12-Nov-07	13-Feb-09	25-Feb-11

82. These examples confirm that Bear Creek's alleged justification that it had to use Ms. Villavicecio to avoid the risk of losing priority over the concessions to third parties has no merit. Bear Creek has not identified a single instance where a foreign company in Perú tried to obtain a concession properly and then lost that concession to a third party due to the delays associated with waiting for a public necessity declaration. Respondent is not aware of any either. None of the companies discussed above had any problems with the concession process while they obtained the required declaration of public necessity.

b. <u>Bear Creek's examples of other purportedly similar schemes are not comparable</u>

83. In its Reply, Bear Creek identified four cases in which the State allegedly blessed transaction structures used by other foreign investors to acquire mining concessions in the border zone that it says were similar to Bear Creek's scheme, or at least similarly violative of Article 71

[130] *See* Laksmi VI Mining Title File (Excerpts) [Exhibit R-267].

[131] *See* Angostura Mining Title File (Excerpts) [Exhibit R-268]; Pucurá Mining Title File (Excerpts) [Exhibit R-269].

[132] *See* Yauliyacu 42 Mining Title File (Excerpts) [Exhibit R-270].

under Respondent's reading of that provision here.[133] According to Claimant, in all of these cases the State was fully aware of the foreign presence in these operations, but nevertheless the Council of Ministers approved a declaration of public necessity and has not since challenged any of these operations on grounds of violating Article 71. Respondent's mining law expert, Dr. Rodríguez-Mariáteguiexplains, however, that these cases differ from Bear Creek's acquisition of the Santa Ana Project in meaningful respects.[134] None of these examples is directly comparable to the case of Bear Creek. Moreover, even if these cases were comparable to that of Bear Creek, the errors allegedly committed by the State in these cases do not constitute a source of law and cannot validate Bear Creek's unlawful actions.

(i) Supreme Decree No. 024-2008-DE (Rio Blanco/Zijin)

84. Supreme Decree No. 024-2008-DE, issued on December 27, 2008, granted a declaration of public necessity to Xiamen Zijin Tongguan Consortium Investment and Development Co. Ltd ("Zijin") that authorized it to acquire indirectly 35 mining concessions in the border region for the "Rio Blanco" project. According to Bear Creek, Zijin indirectly acquired the 35 concessions by acquiring the shares of a Cayman Islands company Monterrico Metals Plc ("Monterrico"), which in turn controlled the Peruvian companies Minera Majaz S.A. (owner of 8 concessions) and Compañia Minera Mayari S.A.C. (owner of 27 concessions).[135] Claimant alleges that Zijin acquired control over Monterrico prior to obtaining a declaration of public necessity, and that the Government was aware of Zijin's prior acquisition when it

[133] *See* Claimant's Reply at paras. 47-65.

[134] *See* Rodríguez-Mariátegui Second Report at para. 41 [Exhibit REX-009].

[135] *See* Claimant's Reply at para. 48.

approved the declaration of public necessity.[136] This case is not comparable with that of Bear Creek.

85. First, Bear Creek's description of the facts omits the key fact that an earlier supreme decree granting a declaration of public necessity had already been issued in 2003 for most (28 of 35) of these concessions for foreigners that, at that time, proposed to indirectly control the concessions.[137] According to Zijin's application for a declaration of public necessity, Zijin would have control of Monterrico (a British[138] company). Monterrico controlled Copper Corp. Limited (Cayman Islands), which in turn controlled Rio Blanco Copper Limited (Cayman Islands), which in turn controlled Minera Majaz S.A (holder of 8 mining concessions). Importantly, Rio Blanco Copper Limited acquired its interest in Minera Majaz SA on July 9, 2003, after the Government had authorized the operation under Article 71 through a public necessity declaration in Supreme Decree No. 023-2003-EM, issued on June 26, 2003.[139] In addition, Monterrico controlled Mayari Mining Company SAC (holder of 27 mining concessions). For 20 out of Mayari's 27 concessions, MINEM had also issued an earlier supreme decree declaring the public necessity a foreigner's (Newmont Perú Limited, Sucursal del Peru) acquisition of those mining concessions—Supreme Decree No. 022-2003-EM, issued

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[136] *See* Claimant's Reply at paras. 49-50.

[137] *See* Rodríguez-Mariátegui Second Report at paras. 46 [Exhibit REX-009].

[138] Claimant describes the Monterrico as being a Cayman Island Company, but Monterrico's application to a declaration of public necessity states that the company is British. *Compare* Claimant's Reply at para. 48 with Copy of the file with the administrative procedure which led to Supreme Decree No. 024-2008-DE, at pp. 005 [Exhibit C-0209].

[139] *See* Copy of the file with the administrative procedure which led to Supreme Decree No. 024-2008-DE, at pp. 005, 0068 [Exhibit C-0209].

on June 27, 2003.[140] Thus, unlike Bear Creek's case, in this case the Government had already assessed and twice allowed a foreign presence linked to the Rio Blanco project.[141]

86. While these earlier public necessity declarations for 28 of the 35 Rio Blanco concessions were not issued to Zijin, they do indicate that the Peruvian State had an interest in developing the corresponding project area in the border zone, and that it had already agreed to a foreign presence in the area. In contrast, in Bear Creek's case, the State had not expressed any previous approval of the presence of foreigners in the border zone at or near the Santa Ana Project.[142] To the contrary, the State had *objected* to a foreign presence at the Santa Ana site in the past. In 2001, the Government refused to issue a declaration of public necessity to another foreign company (Apex Silver) for the very same area where the Santa Ana Project is currently located, due to security concerns.[143]

87. Second, Dr. Rodríguez-Mariáteguiexplains that neither the nature of Zijin's operation nor its magnitude is comparable to Santa Ana's.[144] Zijin acquired Monterrico shares through a takeover (forced sale) operation, which did not involve any planned or purposeful circumvention of Article 71. Moreover, Zijin acquired mining concessions that had already been issued to a party.[145] Thus, Zijin did not use a Peruvian national or entity as a front to request mining concessions to circumvent Article 71 of the Constitution, as in Bear Creek's case; when the Peruvian companies Minera Majaz SA and Compañia Minera Mayari S.A.C. acquired their

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[140] Supreme Decree Approving Declaration of Public Necessity for Newmont Perú Limited, Supreme Decree No. 022-2003-EM, June 27, 2003 [Exhibit R-281].

[141] *See* Rodríguez-Mariátegui Second Report at para. 46 [Exhibit REX-009].

[142] *See* Rodríguez-Mariátegui Second Report at para. 47 [Exhibit REX-009].

[143] *See* MINEM's Decision Rejecting the Declaration of Public Necessity to ASC PERU LDC (Apex Silver Mines Corp.), January 2001 [Exhibit R-189]; Patricia Quiñones, *Concessions, Participation, and Conflict in Puno. The Santa Ana Case*, THE LIMITS TO THE MINING EXPANSION IN PERU 43 (2013) [Exhibit R-117].

[144] *See* Rodríguez-Mariátegui Second Report at para. 48 [Exhibit REX-009].

[145] *See* Rodríguez-Mariátegui Second Report at para. 45 [Exhibit REX-009].

respective mining concessions, they did not act deceptively as a covert intermediary to acquire concessions on behalf of an alien. By contrast, Bear Creek purposefully used an intermediary to acquire the mining concessions and keep them until such time as it obtained a declaration of public necessity. In addition, Zijin estimated its investment in Rio Blanco at a larger scale, US $ 1.440 million,[146] compared to Bear Creek's projected investment of US $ 485,000 for the exploration stage.[147] Zijin's acquisition of Monterrico also involved its acquisition of multiple other mining projects in Perú such as Maramiña, Antayamarca, Pico Machay, etc. Thus, Zijin's acquisition of Monterrico represented potential benefits for the country on a much different scale than was at issue in Bear Creek's case. In any event, it is apparent that the case of Zijin is not comparable to the case of Bear Creek.[148]

(ii) Supreme Decree No. 021-2003-EM (IMP)

88. Supreme Decree No. 021-2003-EM, issued on 26 June 2003, authorized IMP Perú SAC ("IMP") to acquire seven concessions in the border zone. In that case, Ms. Catalina Tomatis Chiappe (a Peruvian lawyer) acquired seven mining concessions in the border zone in October 2000 and then transferred them to IMP, a foreign-controlled company, prior to IMP obtaining the June 2003 declaration of public necessity.[149] Bear Creek claims that it is clear that Ms. Tomatis acted on behalf of IMP under an agreement with the company and its shareholders.[150]

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[146] *See* Copy of the file with the administrative procedure which led to Supreme Decree No. 024-2008-DE, at p. 011 [Exhibit C-0209].

[147] *See* Request from Bear Creek to MINEM soliciting the authorization to acquire mining rights located in the border area, December 4, 2006, at p. 8 [Exhibit C-0017].

[148] *See* Rodríguez-Mariátegui Second Report at para. 48 [Exhibit REX-009].

[149] *See* Claimant's Reply at para. 55.

[150] *See* Claimant's Reply at para. 56.

89. Bear Creek incorrectly assumes, however, that the officials who approved the declaration of public necessity were aware of the details of the relationship and any agreements that may have existed between Ms. Tomatis and IMP. Claimant fails to prove that the officials should have known that Ms. Tomatis was acting on behalf of IMP when she requested the concessions. Bear Creek submits corporate documents that show a relationship between Ms. Tomatis and IMP.[151] However, Bear Creek does not show that the government was aware of these documents at the time it approved IMP's declaration of public necessity. According to Dr. Rodriguez, this sort of information is not normally provided as part of a request for a declaration of public necessity.[152] Thus, it is not reasonable to conclude that officials of MINEM or members of the Council of Ministers were aware of or had reviewed these documents at the time the Council approved the declaration of public necessity. Additionally, Bear Creek has not shown that there was a relationship of dependency between Ms. Tomatis and IMP, as there was between Ms. Villavicencio and Bear Creek, or that Ms. Tomatis was in fact acting as a front or sham acquirer for IMP. Thus, the IMP case is not comparable to the case of Bear Creek.

90. In addition, it is significant to note that the IMP concessions have since expired.[153] Thus, even if the State came to believe that an Article 71 violation took place in 2003, there would be no action to be taken against these concessions or IMP. The concessions have already reverted to the State, which is the consequence that Article 71 specifies ("under penalty of losing that so acquired right to the State") for any violation of its terms.

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[151] *See* Archived File of Entry N° 8 of File N° 11564463 of the Corporate Registry of the Public Registry Office of Lima [Exhibit C-0213]; Archived File of Entry C00001 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima [Exhibit C-0214]; Entry C00005 of File 11564463 of the Corporate Registry of the Public Registry Office in Lima [Exhibit C-0215].

[152] Rodríguez-Mariátegui Second Report at para. 50 [Exhibit REX-009].

[153] Rodríguez-Mariátegui Second Report at para. 51 [Exhibit REX-009].

(iii) Supreme Decree No. 041-94-EM (Colorobbia)

91. Supreme Decree No. 041-94-EM, issued on October 6, 1994, authorized Colorobbia Holding SPA ("Colorobbia"), a foreign company, to acquire shares in the Peruvian company Compañia Minera Ubinas SA ("CMU"), the owner of three concessions in the border zone. According to Bear Creek, the Colorobbia transaction was similar to that of Bear Creek, because a shareholder and manager of CMU, Mr. Hugo Forno, had previously acquired the mining concessions in December 1990 and transferred them to CMU upon issuance of Supreme Decree 041 in October 1994. Bear Creek concludes that Mr. Forno "most likely" acted on behalf of CMU when he requested the concessions in 1990 and then transferred them to Colorrobbia after the company had acquired the declaration of public necessity in 1994.[154]

92. Dr. Rodríguez-Mariáteguiexplains in his report that this operation also is not comparable to the case of Bear Creek. First, Mr. Forno acquired concessions that had already been granted to another party; they were not unclaimed concessions like those for the Santa Ana Project. Because these concessions had already been issued, there was no reason for Mr. Forno to act as a proxy or intermediary for CMU. CMU could have signed an option contract directly with the previous owner of the concessions. Thus there is less reason to suspect that Forno was acting on CMU's behalf because there was no evident reason for them to use such an artifice. Second, Bear Creek has not demonstrated that there was an arrangement between CMU and Mr. Forno to acquire the concessions on CMU's behalf. By contrast, Claimant has admitted that Bear Creek instructed Ms. Villavicencio to acquire concessions to mitigate the perceived (albeit misperceived) risks of third parties interfering with the concessions.[155]

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[154] *See* Claimant's Reply at para. 60.

[155] *See* Claimant's Memorial at para. 25.

93. Third, Bear Creek has not shown a basis to believe that the State was aware of the alleged indirect acquisition of concessions through Mr. Forno at the time that it issued the declaration of public necessity to Colorobbia. The documents Bear Creek has submitted to show knowledge of the State are not probative because there is no indication that the documents were made available to the officials reviewing the case, and such documents would not be usually part of a request for a public necessity declaration.[156] MINEM does not do, and does not have to do, a search of all publicly or otherwise available information to determine if a request is somehow meant to circumvent the Constitution. MINEM's review is performed presuming the good faith of the applicant and is limited to the documentation that is submitted.[157] Therefore, the information furnished by Bear Creek is not information that necessarily would have been evaluated by the competent authorities.

94. And even if that were the case, Mr. Forno's position is rather different from that of Ms. Villavicencio, which weakens any assumption that he was under CMU's control. A "well-known corporate lawyer"[158] would not typically be presumed to be in the sort of position of financial dependency of an administrative employee of a junior mining company. A "well-known corporate lawyer" may very well have the financial capacity to acquire mining concessions on his own, whereas it is entirely unlikely that an administrative employee such as Ms. Villavicencio was acquiring the concessions for her own benefit.[159]

95. Finally, it should also be noted that the Colorobbia concessions have since expired.[160] As was the case with respect to IMP, if even if the State came to believe that an

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[156] Rodríguez-Mariátegui Second Report at para. 53 [Exhibit REX-009].

[157] *See* Zegarra Second Witness Statement at para. 21 [Exhibit RWS-007].

[158] Claimant's Reply at para. 60.

[159] *See* Rodríguez-Mariátegui Second Report at para. 73 [Exhibit REX-009].

[160] *See* Rodríguez-Mariátegui Second Report at para. 54 [Exhibit REX-009].

Article 71 violation took place in 1994, there would be no action to be taken against these concessions or Colorobbia. The concessions have already reverted to the State, which is the consequence that Article 71 specifies ("under penalty of losing that so acquired right to the State") for any violation of its terms.

(iv) Supreme Decree No. 013-97-EM (Rio Blanco)

96. Supreme Decree No. 013-97-EM, issued on July 16, 1997, authorized Rio Blanco Exploration LLC ("Rio Blanco") to acquire shares of the Empresa Minera Coripacha S.A. ("EMC"), the holder of 18 mining concessions in the border zone.[161] EMC had acquired the mining concessions between 1993 and 1995 from individuals who were lawyers of the law firm Rubio, Leguia and Normand ("Rubio"). At that time, according to Bear Creek, the same lawyers from the Rubio firm that had acquired the concessions were shareholders of EMC.[162] Also according to Bear Creek, four foreigners who were allegedly related to the foreign company Rio Blanco were authorized as legal representatives of EMC starting in 1994.[163] From these data points, Bear Creek summarily concludes that the lawyers from Rubio must have applied for the concessions at the direction of and because of their relationship with Rio Blanco.[164]

97. The documentation provided by Bear Creek is, however, insufficient to conclude that the Rubio lawyers had a prior agreement with Rio Blanco for the acquisition of concessions, or that officials of the Ministry of Energy and Mines had knowledge of the alleged relationship between Rio Blanco and the Rubio lawyers. There is simply insufficient evidence to consider this case to be comparable with that of Bear Creek.[165]

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[161] *See* Claimant's Reply at para. 62.

[162] *See* Claimant's Reply at para. 63.

[163] *See* Claimant's Reply at para. 63.

[164] *See* Claimant's Reply at para. 64.

[165] *See* Rodríguez-Mariátegui Second Report at para. 56 [Exhibit REX-009].

98. In sum, Bear Creek's four examples do nothing to suggest that Bear Creek has acted appropriately under Peruvian law. Indeed, Bear Creek's attempt to validate its unlawful actions by pointing out that other companies may have allegedly acted in the same or similarly unlawful ways is rather childish. The existence of any such cases could not establish that Bear Creek's scheme to acquire the concessions without complying with Article 71 was lawful. It was not.

99. Perhaps even more importantly, even if one or more of the four cases were shown to constitute violations of Article 71 against which the State could have or should have acted, the fact that the State has not sanctioned any of these other cases does not validate, under any circumstances, Bear Creek's own violation to the Peruvian Constitution.[166] Under Bear Creek's logic, if a State fails to apprehend or prosecute all criminals, it means that their crimes should not be deemed illegal and the State cannot prosecute those who are apprehended. That would be absurd.

4. Bear Creek Does Not Succeed in Its Search for Validation of Its Circumvention of Perú's Constitution

100. Faced with the simple and straightforward reading of Article 71 that condemns Bear Creek's scheme to circumvent it, Claimant tries to find other validation for the argument that Bear Creek acted in accordance with Peruvian law (it did not). At numerous points in the Reply, Bear Creek and its CEO, Mr. Andrew Swarthout, variously claim that representatives of Peru, the Council of Ministers itself, and Peruvian lawyers "implicitly and explicitly" endorsed Bear Creek's arrangements with Ms. Villavicencio to acquire the mining concessions.[167] Those alleged endorsements do not withstand scrutiny.

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[166] Rodríguez-Mariátegui Second Report at para. 57 [Exhibit REX-009].

[167] *See* Claimant's Reply at paras. 23, 27, 38; Swarthout Second Witness Statement at para. 12.

101. First, Bear Creek alleges that Peruvian government entities and officials confirmed the legality of Bear Creek's actions.[168] They did not, and could not. None of the entities and public officials that allegedly endorsed Bear Creek's scheme had any authority to determine whether a constitutional violation had occurred.

102. Second, Bear Creek also alleges that Supreme Decree No. 083-2007-EM, which granted Bear Creek's declaration of public necessity, cured any possible violation that had occurred, and that Peru, thus, has waived its right to claim any violation of Article 71.[169] It did not. Bear Creek once again misrepresents Peruvian law.

103. Third, Bear Creek proclaims that its own lawyers confirmed the legality of its actions.[170] Bear Creek mischaracterizes the lawyers' legal opinions and gives them more weight than it should.

a. Neither SUNARP nor Ms. Clara García Hidalgo could have issued an authoritative opinion on the constitutionality of Bear Creek's scheme

104. Bear Creek claims that its scheme to acquire the Santa Ana concessions was legal because various Peruvian entities and officials allegedly confirmed its legality. They did not.

105. First, Bear Creek claims that Perú's administrative tribunal overseeing the public Registry on which real or personal rights (such as concessions and contracts) are recorded (the "SUNARP Tribunal") confirmed the legality of Bear Creek's scheme to acquire the Santa Ana concessions through Ms. Villavicencio. Bear Creek contends that the SUNARP tribunal's decision to permit the registration of Bear Creek's option contracts (over an earlier objection that Bear Creek had not yet obtained a declaration of public necessity under Article 71) was not

[168] *See* Claimant's Reply at paras. 23,26.

[169] *See* Claimant's Reply at para. 38.

[170] *See* Claimant's Reply at para. 27.

"devoid of any legal authority," and that the SUNARP tribunal took an important step by publishing the decision in the Peruvian official gazette "putting all actors of the Peruvian mining sector on notice of the important issues."[171] Bear Creek distorts the weight or authority of that decision.

106. In his first expert report, Respondent's mining law expert, Dr. Rodriguez, explained that the SUNARP tribunal has no authority to decide the legality of a contract, and much less to decide on constitutional questions. The SUNARP tribunal merely decides whether a document (in this case, the option contracts) is subject to registration or not.[172] His expert testimony is largely uncontested.

107. Dr. Rodríguez-Mariáteguiconfirms that testimony in his second expert report. The SUNARP's tribunal jurisdiction is limited to reviewing whether a document can be registered or not. The fact that a document is registered by SUNARP does not create and cannot create rights; it only puts others on notice of claims to the concessions. It is for the courts in Perú to decide about the legality of the option agreements and the acquisition scheme, without giving weight to the decision.

108. The SUNARP's tribunal decision with respect to the registration of Bear Creek's option contracts with Ms. Villavicencio did not create any precedent. As Dr. Rodríguez-Mariáteguiexplains, it is not "rare" that SUNARP published this decision, and its publication does not grant the decision the value of creating precedent.[173] If the SUNARP tribunal wanted the decision to constitute a precedent it would have had to state as much in the decision—and it

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[171] *See* Claimant's Reply at paras. 23, 38; Swarthout Second Witness Statement at para. 12.

[172] *See* Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ("Rodríguez-Mariátegui First Report"), at paras. 23-24 [Exhibit REX-003].

[173] *See* Rodríguez-Mariátegui Second Report at para. 39 [Exhibit REX-009].

did not do so.[174] Thus, SUNARP did not confirm and could not have confirmed or endorsed the legality of Bear Creek's scheme.

109. Second, Bear Creek also claims that its actions must be legal because they were allegedly blessed by Ms. Clara García Hidalgo, an advisor to the Minister of Mines in 2011.[175] Bear Creek does not submit a witness statement from Ms. García or any other independent person that could have been present at the meeting to support these allegations; nor does it produce any contemporaneous documentary evidence (*e.g.* notes of meeting, emails) of the conversation. Instead it decides to rely on the uncorroborated testimony of its manager, Mr. Antunez de Mayolo. Mr. Antunez de Mayolo claims that he explained in detail Bear Creek's process for obtaining the concessions, and that Ms. García confirmed the legality of Bear Creek's actions.

110. Even if Ms. García could be proven to have told Mr. Antunez de Mayolo that she thought that their actions had been lawful, Mr. Antunez de Mayolo could not have taken this as an official or authoritative endorsement of Bear Creek's actions. Ms. Garcia was a personal advisor to the Minister; she did not speak for and had no responsibilities for legal reviews or other functions in the Legal Department of the Ministry. The MINEM Minister has personal advisors that keep him informed on important issues with respect to the Peruvian mining and energy industries. None of these advisors has the power to confirm the legality of an individual's or company's activities on behalf of the Ministry. As such, Ms. García could not have provided any authoritative views on the legality of Bear Creek's scheme. Bear Creek could not reasonably have attributed any weight or value to any alleged confirmation from Ms. Garcia.

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[174] *See* Rodríguez-Mariátegui Second Report at para. 39 [Exhibit REX-009].

[175] *See* Claimant's Reply at para. 26.

b. Supreme Decree No. 083-2007 did not constitute an endorsement of, and could not "cure," Bear Creek's unconstitutional scheme

111. On November 29, 2007 Perú issued Supreme Decree No. 083-2007-EM ("Supreme Decree No. 083") approving a declaration of public necessity for Bear Creek and authorizing it to acquire the Santa Ana concessions. Bear Creek claims that because Perú issued Supreme Decree No. 083, it "cured" or excused Bear Creek's scheme to acquire the Santa Ana concessions.[176] Bear Creek's constitutional expert, Mr. Bullard goes as far as to say that, with this Decree, "Perú has foregone its right to challenge it subsequently."[177] These conclusions are without merit.

112. Perú has never waived its right to sanction constitutional violations, such as the one carried out by Bear Creek. First, Perú could not have endorsed Bear Creek's scheme if it did not know the full extent of Bear Creek's relationship with Ms. Villavicencio, which it did not, as discussed in Section B.2. above. Second, nothing in Supreme Decree No. 083 indicates any intention on the part of the State to forgive or waive its right to sanction such a constitutional violation.

113. Dr. Eguiguren and Dr. Danos explain that Dr. Bullard's arguments are unfounded. Perú approved Supreme Decree No. 083 in good faith, and without knowledge of the constitutional violation. If the Government later discovers that Bear Creek violated the Constitution prior to obtaining Supreme Decree No. 083, the Government is entitled to sanction the constitutional violation.[178]

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[176] *See* Claimant's Reply at paras. 37-38.

[177] Claimant's Reply at para. 38.

[178] *See* Eguiguren Second Report at paras. 61-63 [Exhibit REX-007]; Danos Expert Report at para. 102(iv) [Exhibit REX-006].

c. Bear Creek's lawyers' legal opinions

114. Bear Creek claims that its actions must be legal because they were blessed by its lawyers, Estudio Grau, "one of the most prominent mining law firms in Peru."[179] Bear Creek omitted to mention, however, that Estudio Grau's managing partner, Dr. Miguel Grau, was at the time—and remains today— a director on Bear Creek's Board.[180]

115. Moreover, receiving advice from a law firm does not mean that the advice is accurate. Even though it has clearly waived any applicable privilege, Bear Creek has not provided any written memorandum from Estudio Grau, nor has it disclosed what facts it provided or what advice it sought. Without that necessary context, and without the ability to actually examine the details of the advice received—including meaningful caveats and red flags about whether, for example, a given structure is only "arguably" or "likely" to be permissible, or whether it is "yet to be tested", or whether Bear Creek was presented with options including proper compliance with Article 71 and instead chose the riskier approach—the Tribunal cannot give any weight to Bear Creek's blithe assurances that their lawyers thought everything was fine.

116. In an attempt to support the opinions that it says Estudio Grau held (without any proof of such advice), Bear Creek also submits a September 26, 2011 memorandum from another Peruvian law firm, Rodrigo, Elias & Abogados.[181] It is obvious that the Tribunal cannot give any weight to this memorandum. The memorandum was prepared in September 2011, just 3 months after Supreme Decree No. 032 was issued, when Bear Creek was engaged in an intensive effort to lobby the new government—which had just taken power at the end of July 2011—to

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[179] Claimant's Reply at para. 27.

[180] Bear Creek Mining Corporation List of Board of Directors, *available at* http://www.bearcreekmining.com/s/directors.asp (last visited April 11, 2016) [Exhibit R-380].

[181] *See* Memorandum from Rodrigo, Elias & Medrano Abogados to Mr. Alvaro Diaz Castro, Bear Creek Peru, September 26, 2011[Exhibit C-0142].

reverse the actions of its predecessor administration (*i.e.* Supreme Decree No. 032). There is little chance that this memorandum is a neutral legal opinion prepared for Bear Creek's private consumption—Bear Creek would have had little need for that, some 7 years *after* it decided to proceed with Ms. Villavicencio. The far more likely case is that it was prepared for public consumption—for lobbying for the repeal of Supreme Decree No. 032 and/or for litigation. (The Tribunal will recall that Bear Creek initiated an *amparo* action against Supreme Decree No. 032 on July 12, 2011.) Moreover, the legal memorandum suffers from the same defects as Bear Creek's arguments here, in that it appears to assume (incorrectly) that Bear Creek was transparent with MINEM about the full depth of its relationship with Ms. Villavicencio.

5. Conclusion on Bear Creek's Unlawful Acquisition of the Santa Ana Concessions

117. In sum, there is little room for any argument—and no successful argument—that Bear Creek's enlistment of its own employee as a sham petitioner for the Santa Ana concessions, rather than applying for those concessions itself and giving the Council of Ministers opportunity at that time to consider the public necessity of Bear Creek's presence in the border zone, was an unlawful circumvention and violation of Article 71 of Perú's Constitution. That Article gives the Council of Ministers control over foreign presences on the border, so that it can assess Perú's public interests in light of external and internal national security. It is worded—and must be interpreted—broadly to cover all manner of indirect investments in order to ensure that that Executive control and discretion are effective.

118. Worse yet, Bear Creek violated that constitutional restriction when it had no need to do so, as is shown by the experiences of many other foreign investors on the border who successfully pursued the constitutionally proper procedure. And Bear Creek can find no

legitimate support—other than from the lawyers and experts it has hired itself—for its circumvention of Perú's Constitution.

C. BEAR CREEK DID NOT HAVE THE SUPPORT OF THE LOCAL COMMUNITIES THAT IS NECESSARY TO CONSTRUCT OR OPERATE A MINE

119. As noted at the outset of Section B above, Supreme Decree No. 032 was grounded on two elements: Bear Creek's unconstitutional acquisition of the Santa Ana concessions (as just discussed), and the chaotic social crisis that the Department of Puno experienced in the first half of 2011. We turn now to that second element, describing first in this Section C the nature of Claimant's failure to obtain community support and then in the next Section D the events that resulted from Claimant's flawed approach to social licensing and community outreach, including violent protests in 2008 up through the social crisis in 2011.

120. Claimant argues that it was not responsible for the protests that will be described in Section D, and that it enjoyed the support of the local communities.[182] In fact, Claimant appears to believe that it cannot bear any blame for, and the Santa Ana Project cannot have been a trigger of, the 2011 disruptions in Puno because Claimant complied with the minimum requirements of Peruvian law that govern a company's social interactions with the communities where a project is located.[183] This reflects a misunderstanding of Peruvian law as well as international norms of social responsibility. As the following Section C explains—and as the strength of the Puno protests make manifestly clear—Claimant failed to obtain the all-important "social license" from the communities surrounding Santa Ana that is necessary to operate any mine and particularly a large, open-pit operation. Far from granting Claimant that social license, the communities rebelled against Claimant's project, leaving the Government facing a crisis

[182] Claimant's Reply at paras. 105-108.

[183] Claimant's Reply at paras. 105, 108.

situation as anti-mining protests—with cancellation of the Santa Ana Project as a top target—paralyzed the Puno region. The excuses in Claimant's Reply fail to absolve its own culpability for these events.

1. A "Social License" from Affected Communities Is an Essential Component of Any Mining Project

121. A social license is a crucial part of any mining project, particularly given the intrusive and disruptive nature of mining.[184] Oftentimes, mining projects are located in extremely rural lands that are owned by indigenous peoples engaged in agriculture.[185] To enter onto such lands and construct and operate a mine, the company must seek the approval of the indigenous landowners, possessors, and other groups that may be affected by the company's presence. This is what is often referred to as a "social license," because it reflects an approval or permission that can only be "granted" by the affected communities.[186] Critically here, the social license *cannot* be granted by a government—it is not a regulatory or statutory authorization, but rather an approval (or at least acquiescence) that comes from the communities themselves. As

[184] *See* Davis and Franks, "Costs of Company-Community Conflict in the Extractive Sector," Harvard Kennedy School of Government ("Davis and Franks, *Costs of Company-Community Conflict*"), at p. 11 ("There is a growing recognition within the extractive sector of the importance of a 'social license to operate.'") [Exhibit R-272]; Business for Social Responsibility, "The Social License to Operate," 2003, at p. 1 ("[G]aining a social license to operate is now essential for global companies. Companies open themselves up to great risk if they do not achieve constructive engagement.") [Exhibit R-273]; *Id.* at pp. 3-4 ("[W]here there was well-organized, significant opposition to a mining project, no matter their country or political stripe and no matter the prevailing laws, politicians were reluctant to go against it.") [Exhibit R-273].

[185] *See* Government of Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, March 2009, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng (last visited October 4, 2015), at p. 3 ("The [extractive] sector faces unique social and environmental challenges when operating in developing countries.") [Exhibit R-181]; Ministry of Energy and Mines of Peru, General Direction of Environmental Affairs, Guide on Community Relations, January 2001 ("MINEM, Guide on Community Relations"), at p. 63 ("The typical social organizations that the companies of the Energy and Mining Sector have contact with are the Comunidad Campesina in the Andes and the Comunidad Nativa in the Amazon.") [Exhibit R-172]. *See also id.* at pp. 64-68 (describing the agrarian and family-based societies of the Comunidades Campesinas) [Exhibit R-172].

[186] Business for Social Responsibility, "The Social License to Operate," 2003, at p. 4 ("Gaining a social license to operate simply means gaining support for the project from concerned groups, or stakeholders, over and above meeting any legal requirements. . . . strict compliance with prevailing laws is not sufficient to gain approval for projects.") [Exhibit R-273].

such, it may require a company to take measures well beyond those specifically enumerated in a country's mining laws. This is particularly true in an area such as the south of Puno where the Aymara populations had very limited experience with mining and, at most, knew only of the decidedly negative experiences (*i.e.* serious contamination of waterways) of their regional neighbors at the time of the arrival of Bear Creek.

122. The protests in Puno—which specifically called for an end to Claimant's Santa Ana Project—in and of themselves are proof that Claimant took insufficient measures to build trust with the local communities. One cannot say for certain whether, if Claimant had conducted the necessary outreach to earn widespread community buy-in, there would still have been some protests opposing the Santa Ana Project. But one *can* say that the escalating, wide-spread, and unrelenting protests that erupted after Bear Creek pursued a blindered and divisive approach to the affected communities (as discussed below) are persuasive proof that it did *not* have an adequate or successful social license strategy.

123. Claimant argues that any requirement to go beyond the strict letter of the law is an "absurd take on community relations . . . ."[187] For Claimant, compliance with its minimum legal obligations (conducting a certain number of workshops, meeting the technical requirements to hold a public hearing to present the project to the communities, etc.) was sufficient. It is no great leap to conclude that this disdain for internationally-accepted industry practice, and Claimant's own inexperience, is what caused Claimant's problems in the first place.

124. It is notable that Claimant's own government strongly disagrees with Claimant's view. In a March 2009 report aimed specifically at Canada's mining companies operating abroad, the Canadian Foreign Affairs and Trade Ministries acknowledged that mining companies

[187] Claimant's Reply at para. 68.

"face[] unique social and environmental challenges when operating in developing countries" and applauded the policies of those companies that engaged in "voluntary activities undertaken . . . to operate in an economically, socially and environmentally sustainable manner."[188] In 2014, in an update to the original 2009 report, the Canadian Government made even more explicit its commitment to promote "voluntary activities undertaken by a company, over and above legal requirements, to operate in an economically, socially and environmentally sustainable manner."[189] No fewer than four times, the report calls on mining companies, including junior mining companies like Claimant, to "do better than the minimum" legal standard in the host country.[190] It is surprising that Claimant disagrees so vehemently with the express policy of its own Government.[191]

125. As Dr. Rodríguez-Mariátegui explains, companies that are experienced in the construction and operation of mining projects that seek to operate in Perú know that reaching a

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[188] Government of Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector*, March 2009, at p. 2, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng (last visited October 4, 2015) [Exhibit R-181].

[189] Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, November 14, 2014, at p. 1 [Exhibit R-180].

[190] *See* Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, November 14, 2014, at p. 6 [Exhibit R-180] (describing "Canada's commitment to promoting CSR, defined as the voluntary activities undertaken by a company, over and above legal requirements, to operate in an economically, socially and environmentally sustainable manner."), 3 ("Experience has shown that, particularly for extractive sector companies operating in challenging environments, those that go above and beyond basic legal requirements to adapt their planning and operations along CSR lines are better positioned to succeed in the long term."), 6 ("Where host country requirements differ from the international standards listed below, the Government of Canada expects Canadian companies to meet the higher, more rigorous standard."), 14 ("[T]he Government's actions provide a foundation for extractive sector companies, including developers, to go above and beyond legal requirements. . . .").

[191] Since 2010, after the date of the Peru-Canada FTA, Canada has maintained a policy of including "voluntary provisions for C[orporate]S[ocial]R[esponsibility] in all Foreign Investment Promotion and Protection Agreements and Free Trade Agreements signed . . . ." This further underlines Canada's commitment to socially responsible business practices that exceed the legal minimum standards abroad, and its expectations for its own companies operating abroad. Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, November 14, 2014, at p. 15 [Exhibit R-180].

positive consensus in the communities where the mining project is located is crucial to the success of the project.[192] In his first expert report, Dr. Rodríguez-Mariátegui stated that his

> "professional experience with mining in Perú has shown that it is not enough to merely comply with the basic obligations and formalities set forth in the rules governing community participation. It is essential for a mining company to do everything in its power to understand and consult with the communities concerned so that the communities will accept the project and its consequences." [193]

126. Peruvian law requires that, before it can construct a mine or exploit resources, a company must plan for and undertake a community participation process in order to foster responsible relationships with the impacted communities.[194] Claimant's expert, Dr. Hans A. Flury, describes this citizen participation process as a means of "inform[ing] neighboring residents of the scope and impacts of the project."[195]

127. However, Dr. Flury would have this Tribunal accept that the mining companies remain undeterred by the communities' objections to mining activities and that they can develop their projects ignoring the communities' concerns.[196] Dr. Flury attempts to support this statement by reference to Article 4 of the Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, which provides that the process of consultation with indigenous communities is implemented though the citizen participation plan. But, Dr. Flury is

[192] Rodríguez-Mariátegui Second Report at para. 141 [Exhibit REX-009]. *See also* Rodríguez-Mariátegui First Report at para. 63 [Exhibit REX-003].

[193] Rodríguez-Mariátegui First Report at para. 63 [Exhibit REX-003].

[194] *See* Rodríguez-Mariátegui First Report at para. 49 [Exhibit REX-003]. ("Prior to initiating any mining activity, concessionaires must complete a process whereby they involve the local population of the area of influence in any decision making that could affect them.").

[195] Flury Report at para. 69.

[196] *See* Flury Report at para. 72 (quoting Ministerial Resolution Regulating the Citizen Participation Process in the Mining Subsector, Ministerial Resolution No. 304-2008-MEM-DM, June 24, 2008 ("Ministerial Resolution No. 304-2008-MEM-DM"), at Art. 4 [Exhibit R-153]).

misrepresenting the applicable regulations—Article 4 in the supreme decree establishing the citizen participation process that Dr. Flury quotes has since been removed from the regulations by a subsequent resolution.

128. Even setting aside that error, the key mistake of Dr. Flury is that, regardless of the label applied to the rights of the local communities, the citizen participation process under Peruvian law involves considerably more than merely providing the local communities with information. (Moreover, the flaws of the public hearing that Bear Creek conducted would indicate that the company failed even in these most basic, informational responsibilities, as will be discussed in Section D.3.[197]) Peruvian law requires the company to engage in a good faith effort to address community concerns and incorporate community needs into the company's operational plan. This may not constitute a "veto" over licensing or permitting decisions made by the Peruvian government, but, as Dr. Rodríguez-Mariáteguiexplains, this in no way diminishes the importance of the process or the need to fully address community concerns.[198] Later, Dr. Flury does admit that "the purpose sought by a consultation is *to reach an agreement or consensus* with indigenous peoples."[199] Of course, an agreement or consensus requires assent by both parties—the mining company *and* the indigenous communities. The proposition that the local communities can withhold their consent from, but cannot "veto," a project is entirely semantic.

129. The community participation process is meant to begin before the company can even explore for minerals and it continues through the construction and stage and the full life of

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[197] *See infra* at paras. 210 (discussing the questions from the communities that could have been learned through basic knowledge of the EIA executive summary).

[198] Rodríguez-Mariátegui Second Report at para. 140 [Exhibit REX-009].

[199] Flury Report at para. 73 (emphasis added).

the project.[200] In some respects, the participation process is highly detailed (for example, a company must adhere to specific procedures when it holds the public hearing to explain the project to the local communities and receive feedback). But, more importantly, the underlying legal requirements are extremely broad. The law requires, for example, that the company "promot[e] dialogue and consensus building."[201] To achieve that goal, the company must (1) present to MINEM for approval a Citizen Participation Plan that outlines anticipated social outreach measures,[202] (2) provide the community with workshops and information about the potential project,[203] (3) conduct at least one Public Hearing to allow the communities the opportunity to ask questions and learn about the anticipated impacts of the project,[204] and (4) comply with the promises contained in an approved Citizen Participation Plan.[205] Aside from some minimum technical requirements, each of these components is broad—the law guides companies to communicate effectively with the local communities without to specify or impose particular requirements that may not be appropriate to reach community consensus for every project. But the goal of reaching a consensus may involve steps beyond the technical, bare essentials of the law, and may also require measures beyond what was originally anticipated when the company began the process.

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[200] *See* Rodríguez-Mariátegui First Report at para. 51 [Exhibit REX-003]. In order to explore mining concessions, a company must also promote healthy relations with the local communities through many of the same mechanisms used during the construction and exploitation stages. Many of the citizen participation mechanisms that Claimant references in its pleadings relate to those requirements during the exploration stage, and not to the requirements during the later stages. In other words, the workshops and community outreach prior to 2010 cannot be used as evidence that Claimant complied with the promises made in its Citizen Participation Plan, which was only approved in January 2011.

[201] Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, at Art. 3 [Exhibit R-159] (emphasis added).

[202] *See* Rodríguez-Mariátegui First Report at para. 53 [Exhibit REX-003].

[203] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 12, 13 [Exhibit R-153].

[204] *See* Rodríguez-Mariátegui First Report at para. 58 [Exhibit REX-003].

[205] *See* Ramírez Second Witness Statement at para. 17 [Exhibit RWS-006].

130. The citizen participation process is governed by two legal norms in Peru: Supreme Decree No. 028-2008-EM[206] and Ministerial Resolution No. 304-2008-MEM/DM.[207] Supreme Decree No. 028-2008-EM sets out the overarching goal of the citizen participation process. It states:

> *Community participation is a public, dynamic, flexible process* that, through the application of several mechanisms, allows for timely and proper information relating to projected or ongoing mining activities to be provided to the population concerned; *for promoting dialogue and consensus building; and for becoming familiar with and channeling opinions, positions, points of view, observations, or contributions regarding mining activities* in order for the competent authority to make decisions in administrative procedures within its scope of authority.[208]

131. The Supreme Decree makes it clear that the process must be dynamic and flexible, meaning that it must evolve to reach the communities in the most effective way possible.[209] The company must engage in this process with all of those communities "found within the area of influence of the mining activity."[210]

132. MINEM has published a useful practitioners' guide to aid companies in this process ("the MINEM Guide").[211] Although this document is not legally binding, it nonetheless represents a number of best practices that are tailored to community relations in the Peruvian context.[212] As the MINEM Guide makes clear, the company must engage with *both* the directly

[206] *See* Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008 [Exhibit R-159].

[207] *See* Ministerial Resolution No. 304-2008-MEM-DM [Exhibit R-153].

[208] Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, at Art. 3 [Exhibit R-159] (emphasis added).

[209] *See* Rodríguez-Mariátegui Second Report at para. 136 [Exhibit REX-009].

[210] Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, at Art. 2.3 [Exhibit R-159].

[211] *See* MINEM, Guide on Community Relations [Exhibit R-172].

[212] Rodríguez-Mariátegui Second Report at para. 142[Exhibit REX-009].

and indirectly affected communities, and it must inform the communities about the project and receive feedback in turn about how to alleviate community concerns.[213]

133. The Supreme Decree also sets out a number of "minimal conditions": the company will make the Executive Summary of the EIA available to the local communities and will develop a citizen participation plan that describes the mechanisms that the company plans to use to engage the communities.[214] But those conditions are indeed "minimal"—in most cases, the company will need to do much more.

134. Ministerial Resolution No. 304-2008 provides requirements for the processes that a company must go through in order to fulfill Supreme Decree No. 028-2008's stated goal of "dialogue and consensus building." It outlines a number of community outreach mechanisms that, if conducted properly, could—but are not guaranteed—to help the company assuage any community concerns about the project.[215] The Ministerial Resolution also imposes more formal requirements such as "realization of at least one participatory workshop" before the creation of the EIA and again during the creation of the EIA.[216] As will be discussed in greater depth below, the EIA Executive Summary[217] and the Citizen Participation Plan[218] must discuss certain topics or they will be rejected by the DGAAM. The company must also hold one or more public hearings governed by the technical requirements in the Ministerial Resolution regarding (1) the location of the hearing(s), (2) the notice for the hearing(s), (3) the length of time that the

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[213] *See* MINEM, Guide on Community Relations at p. 37 [Exhibit R-172]. *See also id.* at pp. 37-45 (describing measures that can help ensure that communities feel respected and included, and that their concerns are adequately addressed) [Exhibit R-172].

[214] *See* Regulation on Citizen Participation on the Mining Subsector, Supreme Decree No. 028-2008-EM, May 26, 2008, at Art. 14 [Exhibit R-159].

[215] *See* Ministerial Resolution No. 304-2008-MEM-DM at Art. 2 [Exhibit R-153].

[216] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 12, 13 [Exhibit R-153].

[217] *See* Ministerial Resolution No. 304-2008-MEM-DM at Art. 16 [Exhibit R-153].

[218] *See* Ministerial Resolution No. 304-2008-MEM-DM at Art. 15 [Exhibit R-153].

hearing(s) may last, (4) the manner in which community questions may be asked and must be answered, and (5) the means by which the hearing will be memorialized in writing.[219]

135. It should be evident from these requirements that mere compliance with the strict letter of Peruvian law cannot guarantee that the company will obtain the necessary social license from concerned communities, and it was never meant to do so. Instead, the law provides the *processes* by which the company, with the oversight of the DGAAM,[220] can work to try to achieve approval from the relevant stakeholders. As former DGAAM Director Felipe Ramirez explains, the DGAAM cannot provide a company with a social license—that can only come from the communities themselves.[221] Perú's legal requirements for the citizen participation component are a floor—a bare minimum for the company's efforts—that maintains flexibility for the government and for the mining company. It would not make sense, for example, to require an onerous number of workshops in a region where mining is a common industry, welcomed by the local communities. Nor would it be possible to outline in a regulation the specific means of community outreach that would be guaranteed to lead to universal acceptance of any mining project in any region of Peru. Striking the appropriate balance between the interests of mining companies (both domestic and foreign) and the local communities is a difficult issue.[222] The

[219] *See* Ministerial Resolution No. 304-2008-MEM-DM at Arts. 24-25 [Exhibit R-153].

[220] As Felipe Ramírez explained, the DGAAM relies on the information provided by the company or the communities themselves (directly or through the Oficina de Gestión Social (Office of Social Relations)) to monitor community acceptance of the mining project. *See* Witness Statement of Felipe A. Ramírez Delpino, October 6, 2015 ("Ramírez First Witness Statement"), at para. 13 [Exhibit RWS-002]; Ramírez Second Witness Statement at para. 29 [Exhibit RWS-006].

[221] *See* Ramírez Second Witness Statement at para. 47 [Exhibit RWS-006].

[222] *See, e.g.*, Centre for Social Responsibility in Mining, University of Queensland, Getting it Right? Challenges to Prior Consultation in Peru, February 2015 (describing the evolution of the prior consultation requirement balanced between the interests of the mining sector and the local communities) [Exhibit R-271]. Strangely, Claimant accuses Perú of misrepresenting its own laws. *See* Claimant's Reply at para. 72 ("Notably, Article 4 of Supreme Decree No. 28 already incorporated Perú's relevant obligations under ILO Convention No. 169, contrary to Perú's surprising suggestion that it had not yet implemented such obligations.") (citations omitted). Although Supreme Decree No. 28-2008 implemented a citizen participation component, it did not (1) require consultation *prior* to obtaining mining concessions and (2) focus specifically on indigenous communities. These two aspects were added to Peruvian legal

onus is on the company to decide how it will work (within the mining laws) to achieve sufficient support for the project, knowing that if it fails to do so, the project cannot hope to proceed.

136. As noted above, MINEM published the MINEM Guide in 2001 to provide companies with a number of best practices that are tailored to community relations in the Peruvian mining context. Claimant professes to have used the MINEM Guide to develop its EIA and its Citizen Participation Plan.[223] However, it is also clear that Claimant made errors that are specifically addressed—and warned against—in the MINEM Guide.

137. First, the MINEM Guide notes that identifying the *indirectly* affected communities, *and addressing their concerns*, is crucial and can prevent future social conflicts.[224] The MINEM Guide defines the "indirect effects" as "those social, cultural, and economic impacts that originate from the reaction of the communities to the direct effects of the project," such as impacts to land or water resources.[225] Mr. Ramirez, former Director of the DGAAM, also testified that this is an important step because indirectly affected communities are more likely to bear the costs of the project without significant countervailing benefits.[226] Yet, in its December 2010 exploitation-stage EIA, when it was supposed to identify the communities that would be indirectly affected by the Project, Claimant blithely declared that all of Puno would be

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norms in May 2011, amidst the chaos surrounding Santa Ana, in Supreme Decree No. 23-2011-EM. Decree that Approves Regulation on the Proceeding to Apply the Right of Consultation of Indigenous People for Mining Activities, Supreme Decree No. 023-2011-EM, May 12, 2011[Exhibit R-087]. Perú explained this in its Counter-Memorial at para. 135.

[223] *See* Claimant's Reply at para. 71.

[224] MINEM, Guide on Community Relations at p. 23 ("A careful investigation of this responses may help the company to prevent social conflict.") [Exhibit R-172].

[225] MINEM, Guide on Community Relations at p. 23 ("those social, cultural and economic impacts which originate in the communities' reactions to the direct effects of the project.") [Exhibit R-172].

[226] Ramírez First Witness Statement at para. 12 ("In my experience, when the companies have conflicts with the communities over proposed mining projects, it is usually the indirectly affected communities that oppose the project because the project's future benefits are less likely to reach them (such as labor, promised works, or better access roads)." [Exhibit RWS-002].

indirectly affected because the entire region would receive mining royalties.[227] In other words, Claimant focused exclusively on the benefits that would accrue to the region and did not bother to identify how the project would negatively affect any of the specific indirectly affected surrounding communities.[228] The DGAAM identified this mistake as one of its 157 observations (objections) to Bear Creek's EIA.[229] In its response, Bear Creek did not alter the way that it delineated the indirectly affected areas or provide more specific information about which communities would be indirectly affected and how, and instead attempted to justify using recipients of mining royalties as a sufficient proxy for identifying the indirectly affected communities, and concluding that the whole of the Department of Puno was the indirectly affected community.[230]

138. A clearer understanding of the indirectly affected areas could have helped Bear Creek to identify the potential opposition to its project that quickly materialized in force. In fact, as explained in detail in Section D.2 below, Bear Creek already knew at least as of May 2008

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[227] *See* Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, December 2010, at p. 9 [C-0071].

[228] *See* Ramírez First Witness Statement at para. 28 [RWS-002].

[229] DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011, at pp. 30-31 ("The license fee and royalties are not sufficient criteria to indicate that the region be considered as an area of indirect influence, indicate other criteria used to include the province of Chucuito, as well as the Puno department and district, in the Area of Indirect Influence of the Project, more specific criteria such as administrative political criteria, the criteria of stakeholders, social criteria. . . . Mainly the area of Indirect Influence is established regarding the identification of stakeholders and authorities, institutions, non-governmental organizations, unions, social organizations, among others, that are not related to the direct technical, social, economic, environmental and/or cultural effects generated by the project, but that exert positive or negative influence on [stakeholders/interest[ed] groups] and settled populations or those that use the geographic areas of the AISD..") [Exhibit R-040].

[230] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 23-24 [Exhibit R-184]. Bear Creek also notes other criteria that it allegedly used to identify the area of indirect influence, namely the use of water resources and potential for employment at Santa Ana, but it did not use that information to specifically identify which communities may have concerns about water resources or lack of access to employment. It is clear that Bear Creek failed to heed the DGAAM's observation that "Specially the area of Indirect Influence focuses on identification stakeholders and authorities, institutions [etc.] . . . that positively or negatively influence the stakeholders and the local populations or those who use the geographic area of the [Direct Influence Area]in a positive or negative." DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011, at pp. 30-31 [Exhibit R-040].

that neighboring communities strongly opposed the Santa Ana Project—that is, years before the widespread protests paralyzed the Puno region in 2011. Yet, as evidenced by its December 2010 EIA, it appears that Bear Creek elected to ignore that existing opposition entirely, rather than engage with it as the community participation process requires.

139. A second common error, according to the MINEM Guide, is overpromising benefits of the project that cannot materialize.[231] Specifically, MINEM notes that it is detrimental for a company to promise jobs or economic benefits that may not be available to all of the affected communities given the amount of work available and the level of skill needed for those jobs.[232] As Perú explained in its Counter-Memorial,[233] the rotational jobs program that Bear Creek promised—and continues to trumpet in this arbitration as the main evidence of its work with the communities—had serious problems. Suffice to say, by focusing solely on creating employment opportunities for only a subset (5 out of 27) of the affected Aymara communities, Bear Creek made promises that it could not keep and ensured that those who did not receive jobs would come to resent the Santa Ana Project.[234]

140. In its Reply, Claimant also largely ignores the high international standards for mining interactions with local communities, aside from calling them "absurd" as well.[235] Yet, as noted above, the Government of Canada, where Claimant is incorporated, demands that its companies live up to these types of elevated international standards.[236] Established international

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[231] *See* MINEM, Guide on Community Relations at p. 27 [Exhibit R-172].

[232] *See* MINEM, Guide on Community Relations at pp. 27-28 [Exhibit R-172].

[233] *See* Respondent's Counter-Memorial at paras. 84-87.

[234] *See* MINEM, Guide on Community Relations at p. 48 ("There must be extreme caution to invite the Interest Groups, because unwanted privilege may be created.") [Exhibit R-172].

[235] Claimant's Reply at para. 68.

[236] *See* Government of Canada, Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad, November 14, 2014, at p. 3- [Exhibit R-180]; Government of Canada, *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian*

organizations also advise that companies operating in developing countries adhere to higher standards as a matter of good business practice. The International Council on Mining & Metals ("ICMM") is a consortium of 23 mining and metals companies and 35 national and regional mining associations and global commodity associations that seek to "address core sustainable development challenges."[237] To that end, the ICMM insists that "successful mining and metals projects require the broad support of the communities in which they operate, including of Indigenous Peoples, from exploration through to closure."[238] As BHP Billiton, one of the world's largest mining companies, noted in its 2007 sustainability report:

> For society to grant us our 'licence to operate', we must demonstrate to our host communities and governments that we can, and will, protect the value of their environmental and social resources and that they will share in our business success.[239]

141. It would be insufficient, therefore, for a company to focus only on the interests of direct landowners to the detriment of those surrounding communities that will nevertheless be impacted by the project, as Claimant did here. Addressing these broad sustainable development challenges is also not served by simply disparagingly dismissing any community concerns that—in the company's eyes—are factually misguided. For example, rather than disregard community concerns about water contamination,[240] the company should explain, in a non-technical manner

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International Extractive Sector, March 2009, at p. 1 *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng (last visited October 4, 2015) [Exhibit R-181].

[237] "International Council of Mining and Metals Website", *About Us*, *available at* http://www.icmm.com/about-us/about-us (last visited October 4, 2015) [Exhibit R-182].

[238] International Council of Mining and Metals, "Position Statement, Mining and Indigenous Peoples", May 2008, at p. 2 [Exhibit R-178].

[239] BHP Billiton Sustainability Report, Summary Report 2007, at p. B. [Exhibit BR-152]

[240] *See* Claimant's Memorial at para. 75 (disparaging community concerns as a "strategy of deception" because any contaminated water from the Santa Ana project could not physically flow into Lake Titicaca, which was in a separate water basin). This example is even more notable because, although the project would not have been located in the Lake Titicaca basin, it was located in the Rio Desaguadero basin, which is a part of the greater Lake Titicaca,

that the communities can understand, why it is confident that the concerns are misplaced.[241] The ICCM has explained that "any concerns that communities have about potentially negative impacts should be understood and addressed by the company . . .[I]ndigenous groups may not have had any exposure to mining and therefore particular care needs to be taken in the communication of technical information and mining-related concepts."[242] The February 23, 2011 Public Hearing (discussed in Section D.3 below), where Bear Creek failed to address concerns at a technical level that the local Aymara populations could follow, violated this common sense principle.

142. A 2014 report published by the Harvard University Kennedy School of Government and the University of Queensland studied losses that mining sector businesses sustained due to conflicts with local communities.[243] It stated, "[i]ndustry experts observed that the triggers of company-community conflict are increasingly predictable," but "[t]aking the necessary time to prevent and address such conflict, particularly the time needed to build sustainable relationships through engagement with local communities, is often in tension with short-term production targets or ambitious construction schedules."[244] In a region such as Puno, mining represents a grave popular concern because of the way that it can drastically impact the

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Desaguadero, Lake Poopo water system. Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, December 2010, at p. 14 [C-0071].This distinction may well have been lost on the Aymara peoples who consider Mother Earth a sacred place and who rely on the entire water system for survival. *See* Second Expert Report of Antonio Alfonso Peña Jumpa, April 13, 2016 ("Peña Second Report"), at para. 3 [Exhibit REX-008].

[241] *See* International Council of Mining and Metals, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at pp. 16 [Exhibit R-179].

[242] International Council of Mining and Metals, "Good Practice Guides, Indigenous Peoples and Mining", 2010, at pp. 16-17 [Exhibit R-179].

[243] *See* Davis and Franks, *Costs of Company-Community Conflict* at p. 11 ("This report is the product of research into how, and the extent to which, companies in the extractive sector currently identify and understand the costs arising from conflict with local communities around their operations.") [Exhibit R-272].

[244] Davis and Franks, *Costs of Company-Community Conflict* at p. 9 [Exhibit R-272].

agrarian cultures of the local communities that are tied to the land.[245] Moreover, the Aymara people in Puno are inherently distrustful of any intrusion into their lands, be it by the Peruvian government or an international mining company, and therefore will require a greater effort to explain the costs and benefits of a project. Claimant should have been aware—given the specific requirements of Peruvian law, the MINEM Guide, and international norms—that greater community outreach would likely be required to reach and persuade this particular population. The fact that Claimant considers community outreach efforts beyond the legal minimum to be an "absurd take on community relations . . ."[246] is a startling position that indicates a fatal unwillingness to try to create the necessary consensus to build and operate the Santa Ana Project.

2. Bear Creek Can Only Claim Any "Support" by Inappropriately Narrowing the Scope of the Relevant Communities to Those That Supported the Project

143. Faced with the fact that massive protests shook the Puno region and demanded an end to its Santa Ana Project, along with all other mining concessions in the region, Claimant attempts to bolster its own social *bona fides* with purported evidence that "the local communities" supported the Santa Ana Project.[247] The protestors, according to Claimant, were merely outside agitators that had no stake in the Santa Ana Project and were stoked by the political ambitions of one man, Walter Aduviri, a local Aymara leader.[248] The reality is quite different—the Santa Ana Project was the match that lit the flames of social unrest in Puno.

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[245] *See* International Council of Mining and Metals, "Position Statement, Mining and Indigenous Peoples", May 2008, at p. 2 ("[M]ining can have significant impacts on local communities. While these impacts can be both positive and negative, many Indigenous Peoples view their historical experiences of mining negatively. In some cases, mining operations—even though abiding by relevant national laws—have contributed to the erosion of Indigenous Peoples' culture, to restricted access to some parts of their territory, to environmental and health concerns, and to adverse impacts on traditional livelihoods.") [Exhibit R-178].

[246] Claimant's Reply at para. 68.

[247] *See* Claimant's Reply at para. 98.

[248] *See* Claimant's Reply at paras. 98, 283.

144. First, Claimant attempts to claim that its social responsibility platform is "recognized in the industry."[249] This is a highly dubious claim that relies on a single "Social Responsibility Index" created by one mining consulting company (formed only in 2009) that subjectively ranked a subset of junior mining companies listed on the Toronto Stock Exchange Venture Exchange.[250] The Index appears to be a marketing tool for the consulting company MacCormick International Mining Consultancy ("MacCormick"). MacCormick writes that

> "[i]t is our mission to become the most sought after social planning specialists in the mining industry. The foundation for this development begins with the establishment of 'The MacCormick Standard' which will lead our industry towards socially responsible mining practices based on evidence of commitments, through performance indicators that can demonstrate claim to activity."[251]

145. The goal of the Index is apparently to advertise MacCormick's skills in the social responsibility sector to potential clients.

146. Moreover, although the Index says that it measured performance in ten different facets of socially responsible behavior, it fails to explain how it arrived at its rankings in those ten sectors. Instead, it includes the following disclaimer:

> "MacCormick recognizes that there are limitations in ranking website communication and public documents of socially responsible initiatives . . . by only using publicly available information from the company websites, *MacCormick was unable to verify if the companies that are reporting their CSR efforts are actually implementing them*. As well, some companies may mention they are adhering to socially responsible principles but actually are investing in philanthropic programs and projects . . . ."[252]

[249] *See* Claimant's Reply at para. 66.

[250] 2013 MacCormick Social Responsibility Index, 2013 [Exhibit C-0230].

[251] 2013 MacCormick Social Responsibility Index, 2013, at p. 5 [Exhibit C-0230].

[252] 2013 MacCormick Social Responsibility Index, 2013, at p. 62 (emphasis added) [Exhibit C-0230].

147. It therefore appears that the Index was compiled by reviewing company websites and public statements for evidence of socially responsible programs, but without verifying that the companies were actually implementing those programs.

148. Finally, Claimant elected to put on the record MacCormick's 2013 Social Responsibility Index, where Bear Creek was ranked fourth of the companies reviewed. Claimant does not mention that it was not ranked at all in MacCormick's 2012 Social Responsibility Index,[253] which means that, according to the 2012 Index, Bear Creek scored worse than 25 out of 100 on MacCormick's scale.[254] The 2012 Index was closer in time to the protests in Puno that erupted in response to the Santa Ana Project and was therefore more likely to take into account the programs—or lack thereof—that Claimant instituted at Santa Ana. The subsequent 2013 index focuses on programs that Bear Creek created for the Corani Project and, although Santa Ana is mentioned as a Bear Creek property, there is no discussion of the 2011 protests opposing the project.[255] In sum, the 2013 MacCormick Social Responsibility Index cannot be considered evidence that Bear Creek enjoyed the support of the local communities at Santa Ana in 2007-2011, or that it implemented an adequate community relations program to earn that support.

149. Second, Claimant argues that its rotational work program constituted sufficient community outreach because, in Claimant's opinion, employment opportunities were what the community wanted most.[256] Perú explained in its Counter-Memorial that the work program, which would grant at most 110 jobs in an area with a population of almost 30,000, was vastly

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[253] *See* 2012 MacCormick Social Responsibility Index, 2012, at p. 17 [Exhibit R-293].

[254] *See* 2012 MacCormick Social Responsibility Index, 2012, at p. 16 [Exhibit R-293].

[255] *See* 2013 MacCormick Social Responsibility Index, 2013, at p. 38 [Exhibit C-0230].

[256] *See* Claimant's Memorial at para. 59; *see also* Witness Statement of Elsiario Antunez de Mayolo, May 28, 2015 ("Antunez de Mayolo First Witness Statement"), at para. 7.

insufficient to garner widespread support in the communities.[257] Moreover, Claimant appears to have employed a "divide and conquer" strategy, issuing jobs only to the five communities closest to the Santa Ana Project and ignoring entirely the surrounding communities in Huacullani and Kelluyo and beyond.[258]

150. In its Reply, Claimant argues that Perú's criticism "disregard[s] . . . established mining industry practices."[259] According to Claimant, it had only a "few positions that Bear Creek could provide to the local communities" and these "had to be given to members of the communities on whose land the company was drilling."[260] This system was the only way that the directly affected communities would agree to let Bear Creek explore on their communal lands.[261] But with that explanation, Claimant has effectively admitted Perú's point: the "large-scale rotational work program" was not a sign of community support, it was an inducement offered to only a select number of communities in exchange for permission to operate on those lands.

151. The work program that Bear Creek employed—providing jobs only to some communities and not others—ignores the official guidance that MINEM provided for companies in Bear Creek's situation. As discussed above, the MINEM Guide counsels companies to identify fully the areas that will be influenced by the project and to address all of their concerns. Specifically, "[s]ome social sectors could feel marginalized from the project development of the company or the indirect benefits that a project generates in a locality (like new opportunities of

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[257] *See* Respondent's Counter-Memorial at paras. 84-85.

[258] *See* Respondent's Counter-Memorial at para. 84; Expert Report of Antonio Alfonso Peña Jumpa, October 6, 2015("Peña First Report") at paras. 57-58 [Exhibit REX-002].

[259] Claimant's Reply at para. 74.

[260] Claimant's Reply at para. 74.

[261] *See* Claimant's Reply at para. 74.

employment and business) and perceive only the negative impacts."[262] The MINEM Guide warns that marginalized communities "could look to starting conflicts as a way to pressure for benefits."[263] Therefore, a company "should take great care to convene the Groups of Interest since it is possible, without wanting to, to privilege some groups to the detriment of others."[264] The MINEM Guide also expressly warns that it is easy for a jobs program to raise expectations that cannot be met, given the low capacity and skills of the rural populations.[265] Bear Creek still fails to comprehend that the fundamental mistake of its work program was not in failing to have enough jobs for all of the relevant communities, it was in providing benefits to one set of affected communities while ignoring the others.

152. Third, Claimant attempts to demonstrate support for Santa Ana by pointing to agreements that Bear Creek signed—again, with only the few most directly affected Huacullani communities—that Bear Creek says "formaliz[ed] their support for the Project. . . ."[266] In reality, however, these are simply the land use agreements that Bear Creek negotiated with the communities, agreeing to pay money and promise jobs, for the right to conduct *exploration* activities on community land. Bear Creek agreed to pay 6,000 soles and provide 30 jobs to the Parcialidad de Condor Ancocahua, and to pay 2,000 soles and provide 18 jobs to the Comunidad

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[262] MINEM, Guide on Community Relations, at pp. 30-31 ("Some social sectors may feel marginalized by a company's development projects or by the indirect benefits that a project generates in a location (such as new employment and business opportunities) and perceive only the negative impacts.") [Exhibit R-172].

[263] MINEM, Guide on Community Relations at p. 31 ("These groups can seek the mechanism of conflict to push for benefits..") [Exhibit R-172].

[264] MINEM, Guide on Community Relations at p. 48 ("One should be very careful to convene the Interested Groups as it could result in unintentionally favoring some to the detriment of others") [Exhibit R-172].

[265] MINEM, Guide on Community Relations at p. 56 ("the problems that arise at this point are basically poor labor training and excessive expectations for income and job tenure.") [Exhibit R-172].

[266] Claimant's Reply at para. 78 (citing Agreement between Condor Ancocahua and Bear Creek, May 23, 2009 [Exhibit C-0177]; and Agreement between Ancomarca and Bear Creek, July 2, 2009 [Exhibit C-0178]).

Ancomarca[267] in exchange for one year of land use rights. The agreements do not show widespread support for Santa Ana as a large-scale open-pit mine. At most, they show that Bear Creek entered into business relationships with a select few favored communities for the right to *explore* for silver—a drastically less disruptive endeavor.

153. It is also notable that each of these agreements expired in 2010 (May 2010 for the agreement with the Parcialidad de Condor Anocahua and July 2010 for the agreement with the Comunidad Ancomarca). These agreements therefore do not represent a lasting expression of "support for Bear Creek and the Project," as Claimant attempts to claim.[268] To the contrary, the agreements limit any consent to Bear Creek's exploration activities to one year, and they expired months before Bear Creek even requested approval of its EIA for the exploitation stage in December 2010. In fact, as OEFA found in its report from December 2011, Bear Creek illegally conducted exploration activities on community land between September and November 2010 *without* the necessary surface rights.[269] If the communities supported the Santa Ana Project in the way that Claimant claims, it is curious that Bear Creek did not extend these agreements, before or after they expired, to cover the entire exploration phase. Instead, according to OEFA, Bear Creek let the land use agreements expire, but kept conducting exploration activities anyway.

154. Fourth, Claimant argues that two April 2011 letters from the Primer Teniente Gobernador of Huacullani (a community position of authority below the President of the Community) to leadership in the Regional Government of Puno demonstrates the "continued"

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[267] Agreement between Ancomarca and Bear Creek, July 2, 2009 [Exhibit C-0178].

[268] Claimant's Reply at para. 78.

[269] *See* OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, December 31, 2011, at p. 16 [Exhibit C-0180].

support of the "communities close to Santa Ana."[270] Although Claimant refers to two separate exhibits, they are actually the exact same letter, sent from the exact same individual, to two separate representatives in the Puno Regional Government.[271] The letters claim that the Huacullani communities did not intend to participate in an upcoming strike at the end of April 2011 against the Santa Ana Project in Juli, and that they did not participate in a "recent" strike against the Project in Puno.[272] Claimant also cites to three news articles from late March 2011 for this same proposition.[273]

155. These letters and news articles only confirm what Professor Peña learned in his discussions with the people of Huacullani and Kelluyo. As Professor Peña stated in his first report, minortity portions of the Huacullani communities supported the Santa Ana Project because Bear Creek promised them jobs, while other much more numerous and populous communities in Huacullani, Kelluyo, and other neighboring areas anticipated only negative impacts and thus did not support the Project:

> The mining company Bear Creek is viewed by the community members of Huacullani under two perspectives. For a group of community members, it appears as a company that offers work and therefore boosts the local economy bringing development to the district. For others, it appears conversely as a risk of contamination of the territory of their communities and the destruction of their economic activities that they have historically used, such as agriculture and livestock farming. For the community members of Kelluyo district, on the other hand, with

[270] Claimant's Reply at para. 98.

[271] *See* Letter from the Primer Teniente Gobernador of Huacullani District to Juan José Alvares Delgado, Puno Regional Council, April 4, 2011 [Exhibit C-0181]; Letter from the Primer Teniente Gobernador of Huacullani District to Mauricio Rodriguez, President of the Puno Regional Government, April 4, 2011 [Exhibit C-0182].

[272] *See* Letter from the Primer Teniente Gobernador of Huacullani District to Juan José Alvares Delgado, Puno Regional Council, April 4, 2011 [Exhibit C-0181]; Letter from the Primer Teniente Gobernador of Huacullani District to Mauricio Rodriguez, President of the Puno Regional Government, April 4, 2011 [Exhibit C-0182].

[273] *See Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, March 29, 2011 [Exhibit C-0083]; *Comunidades de Huacullani Apoyan a Minera Santa Ana*, CORREO PUNO PRENSA PERU, March 23, 2011 [Exhibit C-0184]; *Huacullani en contra de marcha antiminera*, LA REPÚBLICA, March 29, 2011 [Exhibit C-0185].

> some exceptions, the assessment of Bear Creek is negative, as it is identified as a risk of contamination and abuse to the detriment of their communities.[274]

156. Professor Peña also explained that although these few (5) Huacullani communities may have supported the project in the early stages, even that support eroded over time as the opposition to Santa Ana grew.[275] The Huacullani communities that initially supported the project as of early 2011 were then forced to join the growing protests due to the social pressures from their fellow Aymaras in the surrounding communities.[276] The letters and articles that Claimant references are from April 2011, the beginning of what Professor Peña terms the second stage of the protests, when opposition began to spread outward from the Santa Ana Project's vicinity (the South of Puno) to engulf the entire Puno Region.[277] Although the letters refer to some of the early protests in March and April, many of the major protests, strikes, and road blockages took place in May and June, well *after* the letters. The position espoused by the Huacullani representatives in these April letters and articles was not static; it changed over time as even the few initial supporters of the Project were swept by their broader Ayamara communities into the protests against the Project.

157. This raises a core issue that Claimant repeatedly attempts to obscure. In attempting to portray community support for its operation, Claimant ignores entirely the several neighboring communities that opposed the Project from the very start. It regularly professes that it obtained the support of the "neighboring communities"[278] or the "communities close to Santa

[274] Peña First Report at para. 56 [Exhibit REX-002].

[275] *See* Peña First Report at para. 90 [Exhibit REX-002].

[276] *See* Peña First Report at para. 90 [Exhibit REX-002].

[277] *See* Peña First Report at paras. 84-85 [Exhibit REX-002].

[278] Claimant's Reply at para. 2.

Ana,"[279] but close scrutiny of Claimant's evidence reveals that Claimant has only tried to show that it had the support of the four or five Huacullani communities that owned the land on which the Santa Ana Project would be built.[280] In other words, Claimant only manages to claim support from "local communities" by defining "local" in an absurdly narrow manner, limiting it to just a few thousand meters. It is apparent that Claimant prefers to define "local" in a way that includes only those 5 communities that received jobs from and therefore supported the project, instead of including the 27 communities that Bear Creek itself had identified as being within the "area of influence" of the Project.

158. As Professor Peña explained, Bear Creek worked with a small handful of communities, mostly from Huacullani, by offering them work on the Santa Ana Project:

Comunidades Campesinas with Job Agreements with Bear Creek		
Nro.	**Comunidad or Parcialidad**	**Location**
1	Comunidad Campesina de Concepción Ingenio	Huacullani
2	Comunidad Campesina de Challacollo	Huacullani
3	Comunidad Campesina de Ancomarca	Huacullani
4	Parcialidad de Cóndor de Ancocahua	Huacullani
5	Comunidad Urbana de Huacullani (Junta Vecinal Urbana San Pedro de Huacullani)	Huacullani
6	Comunidad Campesina de Arconuma	Kelluyo

Source: Interviews in Huacullani and Kelluyo of July 20, 21, 29, and 30, 2015.

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[279] Claimant's Reply at para. 98.

[280] *See* Letter from the Primer Teniente Gobernador of Huacullani District to Juan José Alvares Delgado, Puno Regional Council, April 4, 2011 [Exhibit C-0181]; Letter from the Primer Teniente Gobernador of Huacullani District to Mauricio Rodriguez, President of the Puno Regional Government, April 4, 2011 [Exhibit C-0182] (letters from the district of Huacullani professing support for the project and refusal to take part in the April protests); *Rechazan intervención de dirigentes de zonas aledañas en tema de minera Santa Ana*, LOS ANDES, March 29, 2011 [Exhibit C-0083]; *Comunidades de Huacullani Apoyan a Minera Santa Ana*, CORREO PUNO PRENSA PERU, March 23, 2011 [Exhibit C-0184]; *Huacullani en contra de marcha antiminera*, LA REPÚBLICA, March 29, 2011 [Exhibit C-0185] (articles describing the perceived employment benefits that Huacullani residents anticipated, thus convincing them to support the Santa Ana Project); Agreement between Condor Ancocahua and Bear Creek, May 23, 2009 [Exhibit C-0177]; Agreement between Ancomarca and Bear Creek, July 2, 2009 [Exhibit C-0178] (land use agreements that Bear Creek signed with local Huacullani communities allowing Bear Creek to conduct exploration activities on community lands); Acta de Asamblea General Extraordinaria de la Comunidad Campesina de Concepción de Ingenio, April 2, 2011 [Exhibit C-0186] (act of the Ingenio community to approve transferring community land to Bear Creek to construct the Santa Ana Project).

Source: Peña First Report at para. 56 [Exhibit REX-002].

159. On the other hand, Bear Creek ignored many other local communities in the Project's area of influence (defined by Bear Creek itself) that perceived that the Santa Ana Project would disrupt their community lifestyle without accruing any benefits:

Communities and Partialities Excluded from Direct Benefits, According to the Declaration of Area of Influence of the Company Bear Creek		
Nro.	**Comunidades Campesinas y Parcialidades Huacullani Districti**	**Comunidades Campesinas y ParcialidadesKelluyo District**
1	Comunidad de Aurincota	Comunidad de Arconuma
2	Comunidad de Callaza	Comunidad de Totoroma
3	Comunidad de Chacachallo	Comunidad de Alto Aracachi Kelluyo
4	Comunidad de Laca Laca	Comunidad de Carique Challacollo
5	Comunidad de Laca Jaqui o Lacahaqui o Lacahache	Comunidad de Centro Aracachi Chiaraqui
6	Comunidad de Marca Ayllu Huancasama	Comunidad de Kapia Pusuma
7	Comunidad de Tarapoto	Comunidad de Maycu Phujo
8	Comunidad de Alto Andino Vilachave	Comunidad de Perca
9	Comunidad de Vilachave 1	Comunidad de Pérez
10	Comunidad de Yarocco o Yorohoco	Comunidad de Pilco
11		Comunidad de Tulacollo
12		Comunidad de Tuntipucara

Source: Interviews with community members of Huacullani and Kelluyo, July 20, 21, 29-31, 2015.

Source: Peña First Report at para. 59 [Exhibit REX-002].

Additional Communities and Partialities Excluded from Direct Benefits, According to the Assessment of Co-Owners of Huacullani and Kelluyo Districts		
Nro.	Comunidades Campesinas y Parcialidades Huacullani Districti	Comunidades Campesinas y Parcialidades Kelluyo Distric
1	Comunidad de Sillicachi	Parcialidad de Aracachi Chura
2	Parcialidad de Cangachi	Comunidad de Jahuerha Chura
3	Parcialidad de Ancohaqui	Comunidad de San Juan de Aracachi
4	Parcialidad de Carhuankuyo	Comunidad de Jahuerja San Pedro
5	Parcialidad de Quinbalita o Quimbalita	Comunidad de Chacocollo
6	Comunidad de Isruni	Comunidad de Sacacani Huma (ex parcialidad)
7	Comunidad de Arconuma [de Huacullani]	Comunidad de Rio Arenales
8		Parcialidad de Chuncarcollo
9		Parcialidad de Chipana San José
10		Parcialidad de Circa Kenturani
11		Parcialidad de Chipana Nueva Alianza
12		Parcialidad de Vilcanqui Challacollo
13		Parcialidad de Vilaque

Source: Interviews with community members of Huacullani and Kelluyo, July 20, 21, 29-31, 2015.

Source: Peña First Report at para. 60 [Exhibit REX-002].

160. Claimant has tried to portray the protests against Santa Ana as a dichotomy between the nearby communities (who allegedly supported the Project) and the communities "further away from the Santa Ana area" that participated in the protests against the Project.[281] This is not true. As Professor Peña explained, several nearby communities in Kelluyo and Huacullani opposed the project from the beginning because they perceived that harms and no benefits would accrue to them.[282] These communities are listed in the tables above, taken from Professor Peña's First Report.

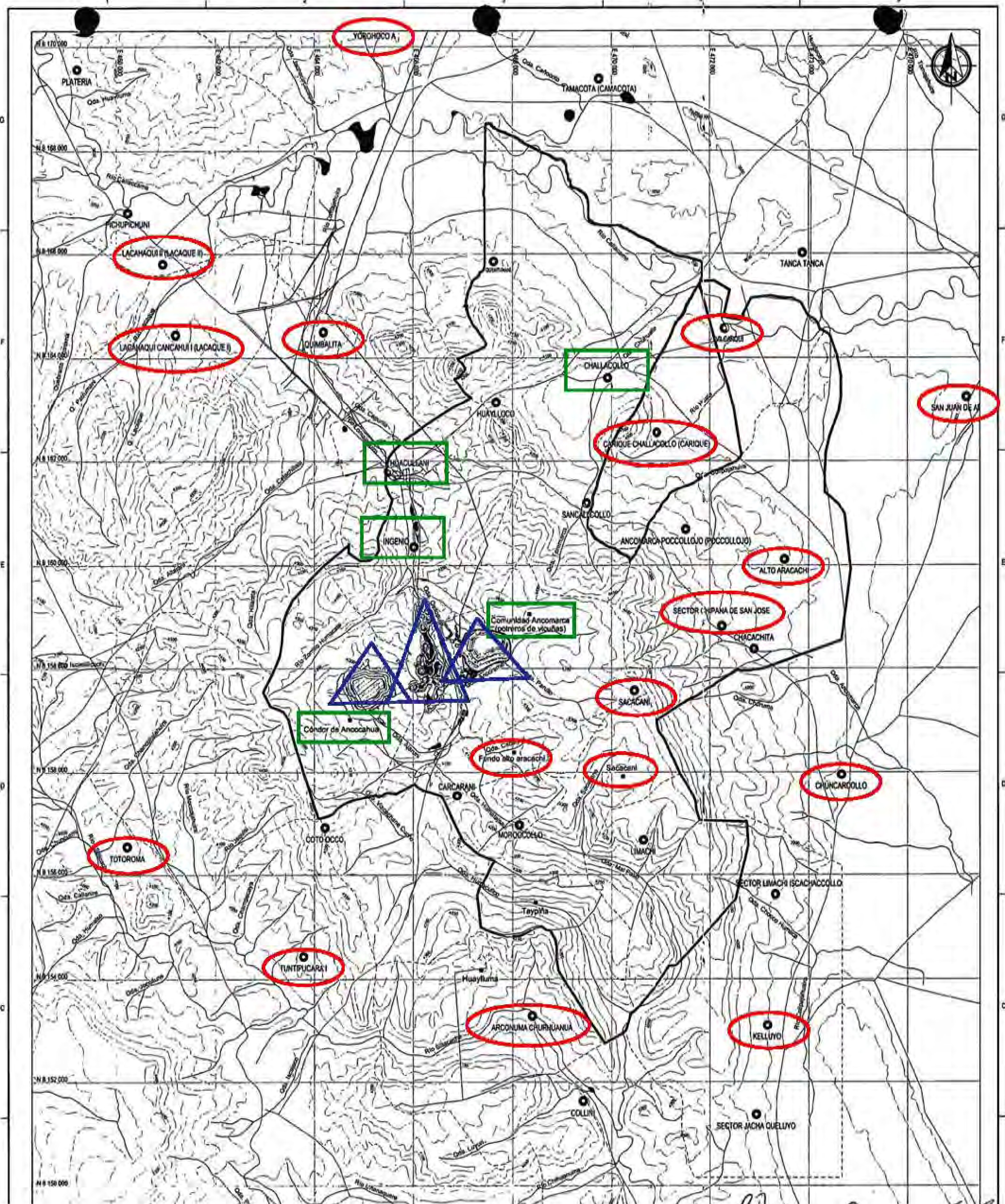
161. Many of these communities lived and worked on lands very close to the Santa Ana Project. Exhibit R-312 is a map taken directly from Bear Creek's EIA for exploitation. The

[281] *See* Claimant's Memorial at para. 67.

[282] Peña Second Report at paras. 19-21 [Exhibit REX-008].

map show a number of communities in relation to the planned Santa Ana Project installations and the area that Bear Creek identified as the area of direct social influence. The communities marked in green are those that Bear Creek employed through its rotational work program. The communities marked in red are the ones that Professor Peña identified as excluded from the benefits of the Project and therefore opposing the Project. The Project components are marked on the map in blue.[283]

[283] Respondent notes that some of the communities listed in Professor Peña's Second Report, para. 52 do not appear in this map. This is because Professor Peña prepared the list of communities affected based on updated information on the name of communities, and his map was prepared by Bear Creek in 2011. *See* Map of Distances of Comunidades Campesinas Population Centers to the Santa Ana Area of Influence [Exhibit R-312]; *see also* Maps Submitted by Bear Creek with Responses to EIA Observations, Annex Z.1 (Excerpts), 2011 [Exhibit R-398]


YOROHOCO A
PLATERIA
TAMACOTA (CAMACOTA)
ICHUPICHUNI
LACAHAQUI II (LACAQUE II)
TANCA TANCA
QUIMSALITA
LACAHAQUI CANCAHUI I (LACAQUE I)
CALACQUI
CHALLACOLLO
SAN JUAN DE A
HUAYLLOCO
CARIQUE CHALLACOLLO (CARIQUE)
HUACULLANI
SANCALLCOLLO
INGENIO
ANCOMARCA POCCOLLOJO (POCCOLLOJO)
ALTO ARACACHI
SECTOR CHIPANA DE SAN JOSE
Comunidad Ancomarca (potreros de vicuñas)
CHACACHITA
SACACANI
Cóndor de Ancocahua
Fundo alto aracachi
Sacacani
CHUNCARCOLLO
CARCARANI
COTO OCCO
MOROCOLLO
LIMACHI
TOTOROMA
SECTOR LIMACHI (SCACHACCOLLO
Taypiña
TUNTIPUCARA I
Huaylluma
ARCONUMA CHURHUANUA
KELLUYO
COLLINI
SECTOR JACHA QUELUYO

162. The map shows that Bear Creek in reality worked only with a small subset of the communities located in the area. Notably, as shown in the exhibit, the scale of the distances shown on the map is in meters. The distance between, for example, the Project installations and the population center of Vilcanqui, one of the communities opposed to the project, is only 8,123 meters. Kelluyo is only 11,330 meters from the Project, and yet Bear Creek elected not to work with the Kelluyo communities. These are not remote "outsiders" opposing the Project—these are its next-door neighbors. Moreover, the opposition to the Project was also strong enough to engage Aymara communities that were at some (though not large) distance from the Project site. The distance between the Project and Zepita is 29,613 meters, or about 18 miles, and the distance between the Project and Pizacoma (not shown on the map) is approximately 49,000 km, or 30 miles —and yet communities from Zepita and Pizacoma participated in the protests against Santa Ana.

163. Claimant's attempt to shrink the area of influence—effectively to only that limited number of communities with members employed by Bear Creek—is transparent and flawed. As the protests themselves made clear, it is not sufficient to try to divide the Aymara communities into a small group of beneficiaries and claim that they supported the Project, while ignoring the great majority of the surrounding communities that strongly opposed it. The Tribunal cannot put on the blinders that Claimant asks it to wear.

3. The DGAAM and MINEM Did Not Approve or Endorse Bear Creek's Social Outreach Efforts

164. Finally, Claimant argues that the Peruvian Government, at various points in time, "approved" the outreach that Bear Creek was conducting with the local communities, such that any allegation now that the communities rejected the Santa Ana Project constitutes

"unacceptable recourse to *ex post facto* arguments."[284] Again, Claimant misunderstands the role of the Peruvian Government in the citizen participation process in several ways elaborated below. The Government did not approve Bear Creek's efforts as being *sufficient* to obtain community support—and even if it had, such an endorsement would be without significance, because the only real measure of the sufficiency of community outreach is whether, in the end, the social license is obtained from the communities (and for Bear Creek, obviously, it was not).

165. First, Claimant argues that the DGAAM's January 2011 approval of the executive summary of the EIA and the citizen participation plan "confirmed that Bear Creek had implemented adequate community relationship programs, in accordance with the applicable law, had maintained good relationships with the communities, and that no social conflicts or issues existed in connection with the further development of the Santa Ana Project."[285] None of this is accurate.

166. As former DGAAM Director Mr. Ramirez explains, his Directorate was tasked with reviewing Bear Creek's EIA, including the executive summary and the PPC (citizen participation plan). However, the DGAAM does not monitor the company's relationship with local communities during this process, unless issues are independently raised to its attention.[286] Instead, the executive summary and PPC are reviewed for compliance with the technical legal requirements for the two documents.[287] Dr. Rodriguez-Mariátegui also explains that these two documents are approved after only a short—7 days—initial review. Although they can be

[284] Claimant's Reply at para. 71.

[285] Claimant's Reply at para. 85.

[286] Ramírez Second Witness Statement at para. 10 [Exhibit RWS-006].

[287] Ramírez Second Witness Statement at para. 16 [Exhibit RWS-006]. These technical legal requirements are also described in Ministerial Resolution No. 304-2008, described above. *See* Ministerial Resolution No. 304-2008-MEM-DM at Art. 15 (describing the technical requirements of the PPC), Art. 16 (describing the technical requirements of the executive summary, Art. 17 (describing the 7 business day "initial evaluation" of the executive summary and the PPC) [Exhibit R-153].

rejected instead, that will only occur in the rare instances where the document is manifestly incomplete.[288]

167. Moreover, the documents are intended to be brief, summary documents, and, contrary to Claimant's descriptions, *not* a "comprehensive account"[289] of the project that lays out the citizen participation mechanisms "in exhaustive detail."[290] First, the executive summary provides a broad overview of the project, and the company is expected to fill in details of interest to the communities during the community participation process. There is no guarantee that the executive summary, when made available to the communities, will adequately explain and address all of the concerns of the local communities. Second, the PPC provides a generic list of the ways that the company intends to engage with the local communities. It provides no content, dates of future events, or substance by which the DGAAM could possibly conclude that the local communities supported (or not) the Santa Ana Project. Most critically, the PPC is in no way guaranteed to result in a social license from the local communities, even assuming that the company follows it precisely. It is simply a plan developed by the company that the DGAAM approves to set the company on the right track.

168. Next, Claimant argues that the DGAAM approved or endorsed the sufficiency of the company's February 23, 2011 Public Hearing (which will be discussed in detail in Section D.3 below) because, otherwise, "the DGAAM could have suspended or cancelled it, and scheduled a new hearing."[291] Again, this misrepresents the community participation process.

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[288] Rodríguez-Mariátegui Second Report at para. 75 [Exhibit REX-009].

[289] Claimant's Reply at para. 81.

[290] Claimant's Reply at para. 70.

[291] Claimant's Reply at para. 96.

169. The Public Hearing is a requirement under the law; the EIA cannot be approved until at least one Public Hearing is conducted. It is a formal opportunity for the mining company to present its project and the key points of its EIA to the communities, and to answer the concerns of the population with respect to the project.[292] At the hearing, an official from the DGAAM and from the Regional Directorate of Energy and Mines ("DREM") of the Department where the mining project is located, in this case Puno, are always present. The officials monitor the public hearing to ensure that the company answers the questions of the communities and to certify that the company complies with a number of other procedural requirements under the law. The DGAAM and DREM officials act as a neutral party during the hearing.[293] At the end of the public hearing, the Secretary of the hearing creates an *acta* that certifies that it took place, the number of questions presented, the number of attendees, and other general aspects of the hearing.[294] The *acta* is drafted in general terms and does not report the level of support a project received from the attendees, nor does it report any disturbances that occurred inside or outside of the hearing.[295] But, this does not constitute a community vote whether to approve or disapprove of the project; it only confirms the accuracy of the limited and general information contained in the *acta*.

170. Once scheduled, the Public Hearing is only cancelled or suspended in the event that public health or safety is threatened.[296] The fact that the Public Hearing that Bear Creek held for its Santa Ana Project took place is not a sign of Government or community support; it

[292] *See* Ramírez Second Witness Statement at para. 23 [Exhibit RWS-006]; Rodríguez-Mariátegui Second Report at para. 146 [Exhibit REX-009].

[293] *See* Ramírez Second Witness Statement at para. 23 [Exhibit RWS-006].

[294] *See* Ramírez Second Witness Statement at para. 23 [Exhibit RWS-006].

[295] *See* Ramírez Second Witness Statement at para. 23 [Exhibit RWS-006].

[296] *See* Rodríguez-Mariátegui Second Report at para. 146 [Exhibit REX-009].

simply shows that public safety was not in danger. Importantly, as Mr. Ramirez explains, the Public Hearing is not the conclusion of the citizen participation component.[297] For many affected citizens, the Public Hearing may be the *first* opportunity to learn about the risks, harms, and benefits of the project. It should therefore be viewed as the initiation of a company's citizen participation program, rather than the culmination of it. Prior to the Public Hearing, Bear Creek was engaged only in exploration activities that are by nature far more limited than a full-scale mine. After the Public Hearing, the company must continue building a consensus for a much more intrusive stage of the project (namely, construction and exploitation).

171. Claimant contends that there was only a small police presence during the Public Hearing, which it says shows that the communities were prepared to keep the peace in support of the Project.[298] A large-scale police presence is not required at the Public Hearing, and is only provided if either the DGAAM anticipates potential violence, or if the company requests it.[299] In this case, neither the DGAAM nor the company requested it. As told by Mr. Ramirez, at the hearing there were around 50 policemen, which is normal.[300] Mr. Ramirez explains in his witness statement that the DGAAM usually tries to avoid having too much police presence to avoid an instant rejection from the population.[301]

172. Again, completion of the Public Hearing is not a sign that the communities supported the Santa Ana Project, or that the Government approved of Bear Creek's community outreach. It merely confirms that the company complied with the technical requirements for the hearing. At Bear Creek's Public Hearing, as described in Section D.3 below, there were in fact

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[297] *See* Ramírez Second Witness Statement at paras. 23-29 [Exhibit RWS-006].

[298] Claimant's Reply at para. 93.

[299] *See* Ramírez Second Witness Statement at para. 24 [Exhibit RWS-006].

[300] *See* Ramirez Second Witness Statement at para. 24 [Exhibit RWS-006].

[301] *See* Ramírez Second Witness Statement at para. 24 [Exhibit RWS-006].

large-scale protests of hundreds of people outside of the hearing and the Aymara people inside the hearing also expressed concerns. The fact that the Government allowed the Public Hearing to be held cannot cancel out any of that evidence that Bear Creek did not have the support of many or even most of those in attendance at the Public Hearing.

173. Third, Claimant next argues that two reports created by the Office of Environmental Evaluation and Prosecution (OEFA) endorse the existence of community support for Santa Ana.[302] Claimant misrepresents the role of OEFA and the meaning of these reports. OEFA is not tasked with monitoring community relations; it is responsible for evaluating a company's environmental compliance. OEFA utilizes independent, private consultants[303] that visit a project site to monitor whether a company is complying with an approved EIA.[304] In the case of Bear Creek, the DGAAM had not approved the EIA for exploitation, so OEFA was monitoring Bear Creek's compliance with the earlier and much more limited exploration EIA. OEFA monitors citizen sentiment only to the extent that the EIA contains specific, measurable commitments, and therefore does not have the authority to make sweeping conclusions about community support for a project. Any information that it receives about general community relations is purely anecdotal.

174. In fact, OEFA did draw a conclusion about Bear Creek's failure to comply with a specific, measurable commitment to the local communities, but Claimant chose to ignore it in its Reply. In December 2011, OEFA concluded that Bear Creek had illegally conducted exploration activities on community land between September and November 2010 without the necessary

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[302] Claimant's Reply at paras. 67, 79-80.

[303] *See* OEFA Report No. 008-2010 MA-SE/EP&S regarding the Santa Ana Project, January 2011 [Exhibit C-0143]; OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, December 31, 2011 [Exhibit C-0180].

[304] *See* Rodríguez-Mariátegui Second Report at para. 147 [Exhibit REX-009].

surface rights.[305] OEFA cannot certify that a company obtained a social license, and it did not do so in this case.

175. Finally, Claimant argues that it "regularly and thoroughly inform[ed]" the DGAAM about its citizen participation activities, such that, if the DGAAM had any complaints about the processes that Bear Creek was undertaking, it should have made those complaints known.[306] In support, Claimant submits a series of letters that Bear Creek sent to the DGAAM in 2009 and 2010 that describe some of the workshops that Bear Creek held for the local communities.[307] None of these letters contains information that would have led the DGAAM to believe that the communities did or did not support the Project. Moreover, all of the letters describe workshops that were held in compliance with the citizen participation process for the smaller-scale exploration of Santa Ana, and they precede the filing of Bear Creek's EIA for exploitation, filed in November 2010. They certainly say nothing about Bear Creek's community relations in 2011.

176. Claimant also references another series of letters that it claims provided regular updates to DGAAM about to Bear Creek's community outreach.[308] Much like the first set of letters, none of these letters provide information that would lead the DGAAM to believe that the communities did or did not support the Project. Instead, in many cases they attach the pages

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[305] *See* OEFA Report No. 0011-2011 MA-SR/CONSORCIO STA regarding the Santa Ana Project, December 31, 2011, at p. 16 [Exhibit C-0180].

[306] Claimant's Reply at para. 77.

[307] *See* Exhibits Letter from C. Rios Vargas, Bear Creek, to F. Ramírez, MINEM, July 6, 2009 [Exhibit C-0157]; Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, October 19, 2010 [Exhibit C-0158]; Letter from F. Ramírez, MINEM to V. Paredes Argandoña, Regional Directorate of Energy and Mines, October 28, 2010 [Exhibit C-0159]; Letter from E. Antunez de Mayolo, Bear Creek, to F. Ramírez, MINEM, Nov. 18, 2010 [Exhibit C-0160].

[308] Claimant's Reply at para. 104; Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, February 1, 2011 [Exhibit C-0187]; Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, March 1, 2011 [Exhibit C-0188]; Letter from A. Balestrini Ponce, Bear Creek, to C. García, DGAAM, April 1, 2011 [Exhibit C-0189]; Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, May 2, 2011 [Exhibit C-0190].

from the log book from Bear Creek's Permanent Office. The Permanent Office, located at the Santa Ana Project site, is meant to serve as a place where the local communities can seek information about the Project, and its existence is a requirement under the PPC.[309] These log book entries demonstrate that the visitors to the Bear Creek Permanent Office were concerned about possible contamination[310] and curious about employment opportunities.[311]

177. None of these "updates" that Claimant provided to the DGAAM would have made it possible for DGAAM to monitor the content (positive or negative) of the interactions between Bear Creek and the surrounding communities. Moreover, as Mr. Ramirez explained in his first witness statement and discussed above, it is not the DGAAM's role to monitor the communities' acceptance or rejection of the Project.[312] Instead, his Directorate monitors only whether the company is complying with the promises made in its PPC. In the case of building support for the Santa Ana Project, however, this was clearly insufficient—as the Puno protests show.

D. THE SURROUNDING COMMUNITIES OPPOSED THE SANTA ANA PROJECT, LEADING TO MASSIVE PROTESTS THAT PARALYZED THE REGION

178. As just discussed in Section C, Bear Creek insists that it had fostered excellent relations with the surrounding communities (very narrowly defined) and had built a groundswell of support for the Santa Ana Project. Section C.1 discussed Bear Creek's responsibility to take the necessary steps to engage all of the directly and indirectly affected local communities—

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[309] *See* 2010 Environmental Impact Assessment Citizen Participation Plan ("PPC"), December 23, 2010 [Exhibit R-227].

[310] *See* Revised C-187: Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, February 1, 2011 [Exhibit R-399]; Revised C-188: Letter from E. Antunez, Bear Creek, to F. Ramírez, DGAAM, March 1, 2011 [Exhibit R-400].

[311] *See* Revised New C-189: Letter from E. Antunez, Bear Creek, to F. García, DGAAM, April 1, 2011 [Exhibit R-401] .

[312] *See* Ramírez Second Witness Statement at para. 6 [Exhibit RWS-006].

reasonably defined—and build consensus and support for the Project, the company's failure to embrace that mandate and to carry out effective community outreach, and the fact that the Government did not and indeed, could not have, endorsed Bear Creek's efforts as sufficient to garner the necessary social license from the affected communities. This Section D now turns to the consequences of the company's approach to community relations—namely, the facts of Bear Creek's strained community relations and the surrounding communities' opposition to the Santa Ana Project.

179. Despite the adverse events of 2008-2011 that we will discuss, Claimant would like this Tribunal to believe that its relations with all of the surrounding communities were consistently peaceful, and that the communities supported the Santa Ana Project and looked forward to the promised employment and prosperity that the mine would bring.[313] But Bear Creek's rosy portrayal ignores clear facts that indicate that Bear Creek's activities in the Santa Ana Project—and particularly its failure to work with *all* of the communities that would be affected by the Project—contributed directly to the social conflict that erupted in Puno in 2011. Remarkably, Bear Creek describes the protests as "unrelated" to the Santa Ana Project.[314] That proposition borders on laughable. If anything, Bear Creek's position confirms its lack of understanding of the Aymara communities, and demonstrates that Bear Creek's efforts to reach out to the neighboring communities were too shallow to understand and address the concerns of the population. At a minimum, Bear Creek mischaracterizes the facts, and its attitude toward the local communities was, and continues to be, borderline negligent.

180. The evidence on the record is clear: Bear Creek did not have the necessary support from neighboring communities to permit it to develop the Santa Ana Project. The only

[313] *See* Claimant's Reply at paras. 66-80.

[314] Claimant's Reply at para. 3.

support that Bear Creek ever had came from only the five communities on whose lands the Project is physically located (a subset of the Huacullani communities) and who received promises of employment, and even that support was quashed as the wider opposition in the other affected communities grew. Even if the company were to return today, it could not obtain the required support to continue with the Project—the communities simply would not allow it.

181. In this Section, Respondent describes the factors and events that led up to the 2011 protests, which show that there was a latent discontent in the communities, which Bear Creek failed to address. As a consequence, by 2011 the Aymara communities strongly opposed all mining activities in the South of Puno, and specifically demanded the cancellation of the Santa Ana Project (the first project in the southern area to approach exploitation). First, Respondent revisits Bear Creek's failure to establish relations with all of the Aymara communities that would be potentially affected by the Project. The communities with which Bear Creek failed to work did not trust the company and strongly opposed the Project. Second, Respondent describes a glaring early sign of opposition to the Santa Ana Project—a protest against the Project that culminated in the looting and burning of the Santa Ana campsite, in October 2008. Contrary to Bear Creek's allegations, this was not an isolated incident that caused minimal damage; it was a mass protest by thousands of people against Bear Creek's mining activities in the area that Bear Creek took very seriously at the time. Third, Respondent describes the events related to the Public Hearing that took place on February 23, 2011, where the majority of the Aymara southern communities heard—for the first time—about the scope and details of the Santa Ana Project. Fourth, Respondent describes the protesters' demands and shows their close relationship to the Santa Ana Project, and the seriousness of the social unrest that paralyzed Puno in March-June 2011. The Aymara communities had legitimate demands and

concerns about mining activities, and it is inaccurate (and unjust) to dismiss the sincerity of the protests or to try to characterize them as political machinations. Finally, Respondent discusses the current situation in the Huacullani and Kelluyo Districts to show that there is still a strong current of opposition to the Santa Ana Project.

1. Bear Creek Failed to Work With All of Its Neighboring Communities

182. As Respondent explained in its Counter-Memorial, the Santa Ana Project is located in the south of the Department of Puno. Puno is a Department located in the southeast of Perú, on its border with Bolivia, as shown in the map below (Figure 1).

Figure 1 Map of Perú. [315]

183. The Santa Ana Project concessions are located in the Chucuito Province of Puno (Figure 2), and they cover part of the Huacullani and Kelluyo Districts. As indicated in Figure 3 below, the Santa Ana Project is mainly located in the district of Huacullani, but at the border between the Huacullani and the Kelluyo Districts. The Project is also surrounded by the Districts of Pisacoma, Desaguadero, and Zepita.

[315] *See* Observatory for Governability – INFOGOB, Map of Perú, *available at* http://www.infogob.com.pe/Localidad/localidad.aspx?IdLocalidad=80&IdUbigeo=000000&IdTab=0 (last visited on September 9, 2015) [Exhibit R-044].

Figure 2 Map of Puno Department. The Santa Ana Project is located in the Chucuito Province, which is in the Southeast of the Puno Department.[316]

Figure 3 Map of Chucuito Province. The Santa Ana Project is located between the Huacullani and Kelluyo Districts of the Chucuito Province.[317]

184. Claimant's own map of its concession (shown below) also shows how its concessions covered the Huacullani and the Kelluyo districts, and were very close to the Pisacoma and the Zepita districts (all of whom actively participated in the 2011 protests). This map is also illustrative of Bear Creek's narrow vision of how it should carry on its community relations. Bear Creek engaged only with certain (mostly Huacullani) communities because the planned Project site was in the two concessions that are in Huacullani, Karina 1 and Karina 9A.

[316] *See* Observatory for Governability – INFOGOB, Map of Perú, *available at* http://www.infogob.com.pe/Localidad/ubigeo.aspx?IdUbigeo=200000&IdLocalidad=1626&IdTab=0 (last visited on September 9, 2015) [Exhibit R-045].

[317] *See* Observatory for Governability – INFOGOB, Map of Perú, *available at* http://www.infogob.com.pe/Localidad/ubigeo.aspx?IdUbigeo=200400&IdLocalidad=1670&IdTab=0 (last visited on September 9, 2015) [Exhibit R-046].

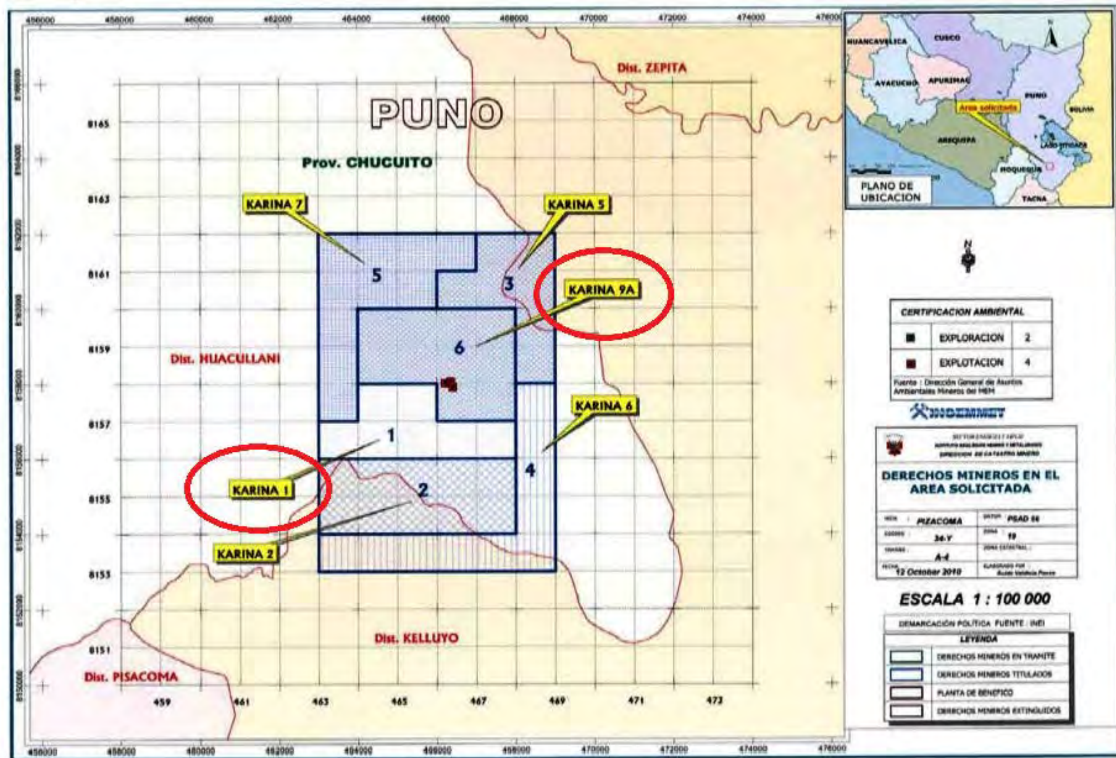

Figure 4 Santa Ana Mining Concessions[318]

185. These maps are helpful to understanding the conflict that arose in Puno in 2011, and Bear Creek's relation to it. As Respondent explained in its Counter-Memorial and in Section C.2 above, Bear Creek centered its attention on five communities closest to the site, granting them economic benefits and offering them jobs.[319] However, in the process Bear Creek alienated other neighboring communities that would also be affected by the Project, in particular the communities that were right next door to the Project, like the Kelluyo communities.

186. The southern region of the Puno Department is populated mainly by the Aymara people. The Santa Ana Project concessions cover the territory of multiple *Comunidades*

[318] *See* Santa Ana Feasibility Study, October 21, 2010, at p. 16 [Exhibit C-0003].

[319] *See* Respondent's Counter-Memorial at para. 82.

Campesinas.[320] Professor Peña, a professor of law and anthropology with particular expertise in and experience with the Aymara people, explains in his expert report that Bear Creek apparently failed to acquire a basic understanding of the Aymara culture and way of life, or to address their strongly-held concerns about mining activities generally and the Santa Ana Project in particular.[321] In Perú, a *Comunidad Campesina* is a social organization of indigenous people.[322] The Aymara communities are defined by their land, to the extent that they would perceive a community without land as having no reason for being. These communities live in remote areas, mostly in poverty conditions. Their native language is Aymara, and Spanish is considered a secondary language. They have a strong oral tradition, and there is a high level of illiteracy in the region.[323] Their main economic activities are agriculture and cattle raising.[324] The Pacha Mama (Mother Earth) is sacred to them, and they have a deep respect for it. Even a small risk of contamination is considered a terrible disrespect to what they hold as sacred.[325] Therefore, any activity that could even potentially contaminate their waterways and water sources would negatively affect them and their way of life. Moreover, Aymaras have a strong and broad sense of community that extends not only to one's own family or *comunidad*, but further to other Aymara communities. Their community defines their lives and how they must behave in society. If a person is rejected by the community, it is as if the person was declared dead. In this sense,

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[320] *See* Peña First Report at para. 57 [Exhibit REX-002].

[321] Peña Second Report at para. 40 [Exhibit REX-008].

[322] *See* Peña First Report at para. 7 [Exhibit REX-002].

[323] Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, December 2010, at p. 21 [Exhibit C-0071].

[324] Ausenco Vector, Environmental Impact Assessment Report for the Santa Ana Project, December 2010, at pp. 21-22 [Exhibit C-0071].

[325] *See generally* Peña First Report at para. 3 [Exhibit REX-002]; Peña Second Report at para. 11 [Exhibit REX-008].

once a community makes a decision on a particular subject, every community member must support it, no questions asked.[326]

187. In contrast to the northern region of Puno, the southern region is not familiar with mining activities.[327] The Aymara communities that inhabit this region therefore are not personally familiar with the possible positive or negative effects of mining—and they only understand mining through the lens of the Aymaras in the North of Puno who have in fact suffered serious contamination of their lands and water sources from mining activities.[328] This was a determining factor in how the Aymaras from the South perceived the Santa Ana Project.[329] The Santa Ana Project was the first mining project in the southern region of Puno that was poised to proceed to exploitation activities, and it would have been the first operating mine in the area. Moreover, as an open-pit operation, it was going to be a very visible and disruptive presence in the area. Thus, Bear Creek should have known that it was going to have a challenging task ahead to introduce the area's Aymara communities to modern mining and whatever safeguards and environmental impact and risk mitigation techniques could be brought to bear, and that in doing so, it would need to work closely with *all* of the communities that could be affected by the mining project to address their concerns. Unless Bear Creek could obtain and maintain a social license both at the outset and throughout the life of the mine, otherwise the Santa Ana Project was always going to be vulnerable to opposition and disruptions at any moment in time.[330]

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[326] *See* Peña Second Report at paras. 7-27 [Exhibit REX-008].

[327] Peña Second Report at para. 20 [Exhibit REX-008].

[328] *See* Peña Second Report at para. 20 [Exhibit REX-008].

[329] *See* Peña Second Report at para. 20 [Exhibit REX-008].

[330] *See* Peña Second Report at para. 21 [Exhibit REX-008].

188. Bear Creek would have this Tribunal believe that it had excellent relations with all of the surrounding communities. The events between 2008 and 2011 show that this was not the case, as Respondent discusses in Sections D.2 – D.4 below. Bear Creek only established *any* relationship with a handful of communities in Huacullani out of twenty-six communities that had been identified as being within the area of influence of the Project. Bear Creek omits or apparently ignores that there was great animosity from numerous neighboring communities—located as close as 5 km from the Project—with whom Bear Creek failed to work closely.[331] As noted above, Bear Creek's relations with the communities were based on a rotating job program, which Bear Creek established with just 5 out of 26 communities within the Project's area of influence.[332]

189. Prof. Peña explains the job program in his expert reports. According to his investigations, Bear Creek had to renegotiate the number of jobs each year with each community in order to secure their continued support, as shown in the table below.

[331] *See* Peña First Report at para. 96 [Exhibit REX-002]; *see also* Maps Submitted by Bear Creek with Responses to EIA Observations, Annex Z.1 (Excerpts), 2011 [Exhibit R-398]; *see also* paras. 182-192 *supra*.

[332] *See* Peña Second Report at paras. 13, 17 [Exhibit REX-008].

Number of Job Posts Bear Creek Granted to Huacullani Communities 2007-2011						
Year	Jobs given to Condor Ancocahua	Jobs given to Challacollo	Jobs given to Ancomarca	Jobs given to Concepción Ingenio	Jobs given to Huacullani [urban area]	Total Jobs
2007	10	5	5	5	0	25
2008	15	10	10	10	3	48
2009	35	25	25	15	10	110
2010	35	25	25	15	10	110
2011 (Jan.)	35	25	25	15	10	110

190. Bear Creek's strategy to engage with only these five communities was not sufficient to address all of the affected communities' concerns with respect to the Project, and it led to divisions among the communities. It was only natural that if the communities were not familiarized with these activities and if only a handful of people were receiving potential benefits, the majority of people would mistrust the company.

191. Bear Creek was in fact aware that the Aymara communities did not have a positive impression of mining activities. In 2009 and 2010, the company carried out surveys of public perceptions about mining—and significantly, it limited those surveys to only the five communities with which the company was working directly—that is, the communities that Claimant says embraced the Santa Ana Project. In those surveys, 55% of respondents had a "regular" ("passable") opinion of mining and 23.2% considered it bad.[333] Thus, almost 80% of

[333] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 25 [Exhibit R-184].

the population—in the five communities in which Bear Creek claims to have had the *most* support—did not have a good opinion of mining activities. Within that 80% some opined that a rotational work program would only benefit a few individuals, and some believed that mining would cause contamination and affect traditional farming. In response to the question "what have you heard about the Santa Ana project," many respondents complained of a lack of information from the company and poor coordination by the company.[334] In addition, out of the 80% that did not have a positive view of mining, 24% expected conflicts with other communities, 19% complained that the company inadequately informed the communities about the project and 10% believed that the company would trick the people and not comply with agreements.[335] A large portion of the people interviewed decided not to answer, or did not know what to answer, to the question of what benefits Santa Ana was expected to bring to the communities—a silence that the report analyzing the survey attributes to a lack of information on the characteristics of the Project, and fears of any retaliation from other communities.[336]

192. These results are illuminating. Even within the communities that supposedly "overwhelmingly" supported Bear Creek and would reap most of the local benefits of the Santa Ana Project, a high percentage of those surveyed mistrusted the company from the outset.[337] Thus, it is only logical that the level of opposition was sure to be much higher in other neighboring communities with which Bear Creek was not working, and which would not receive any direct benefits from the Project. Bear Creek only reached out to explain the Project to some

[334] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 33 [Exhibit R-184].

[335] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 34 [Exhibit R-184].

[336] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 30 [Exhibit R-184].

[337] *See generally* Claimant's Reply at paras. 66, 72 -75.

of the Kelluyo communities in October 2010.[338] But by then, it was probably already too late—as shown by even earlier events, in 2008, discussed next below. Even before the company was ready to move towards exploitation, there was already a large segment of the Aymara population that mistrusted the company, were unhappy about its presence in the area, and feared potential contaminating effects from the Project.

2. After Warning Signs in Prior Months, in October 2008 Thousands Protested Against the Santa Ana Project and the Company's Site Was Sacked and Burned

193. As Respondent described in its Counter-Memorial, the looting and burning of Bear Creek's campsite in October 2008 evidenced the latent conflict between Bear Creek and its surrounding communities.[339] Bear Creek tries very hard in its Reply to minimize the drama of the events of October 14, 2008, and to downplay the impact of this event, asserting that it was an isolated incident and that, after the incident, activities in the camp site went on largely unaffected.[340] Bear Creek even goes so far as to claim that Respondent's references to the October 2008 sacking of the Project site shows its "desperation" to prove that the communities did not support Santa Ana. But it turns out, as this Section will show, that the best proof of that comes from Bear Creek's own mouths, in the form of statements provided to investigating prosecutors and others at the time, which Respondent has now been able to obtain.

194. First, however, it is worth mentioning that the Prosecutor's files are also notable because they identify even earlier events that should have—and presumably did—put Bear Creek on notice that it faced real opposition to its activities. That opposition was notable even in 2008,

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[338] *See* Letters from Kelluyo to *Defensoría* Requesting Information on Santa Ana Project, 2010 [Exhibit R-347].

[339] *See* Respondent's Counter-Memorial at para. 88.

[340] *See* Claimant's Reply at para. 75.

when the company was still conducting only exploratory work, which was nothing like the large-scale mining project that it would later need to propose.

195. For example, as early as May 2008, Bear Creek was well aware that it faced even violent opposition: its staff was "attacked and threatened" in the adjacent Kelluyo District when they tried to explain the company's environmental management. In his interview with the Prosecutor's office (*Fiscalía*) after the October 2008 sacking of the campsite, Bear Creek's Community Relations Manager was asked if the company had experienced hostile incidents in the past. He answered:

> We have handed information to all of the communities that were interested in learning about our activity. We had visits from the Community of Alto Aracachi in Huacullani, from the Community Cotoca in Huacullani, and the Community Chipana Alto. We had visits from the Governor of Kelluyo, who invited us to explain how we handled the environment. *We went with our environmental specialists on May 4, 2008, but we were attacked and threatened. Thus, the Kelluyo District has had aggressive attitudes against the Santa Ana Project,* contrary to our relations with the neighboring communities in Huacullani which were harmonious.[341]

196. Another warning sign came in September 2008. On September 4, 2008, just over a one month before the October 14, 2008 burning of the campsite, Bear Creek employees were physically detained in the Ancomarca Community for 4 to 5 hours in order to pressure Bear Creek to share the benefits of the project with their community. According to Bear Creek's agricultural engineer, during that detention, the Bear Creek employees were threatened and were even told the October 14, 2008 date for the upcoming protest, and warned that "they would see"

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[341] Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 8 [Exhibit R-342].

("*van a ver*") what would happen then.[342] But Bear Creek has never mentioned these events to the Tribunal.

197. Next came the events of October 14, 2008. In his Rebuttal Statement, Mr. Swarthout's describes the October 2008 burning and looting of Bear Creek's camp as an insignificant event. According to Mr. Swarthout, the campsite was ransacked on the day of the monthly Huacullani fair, held on October 14, 2008.[343] People from different communities attended the fair, including people from the Kelluyo communities. Mr. Swarthout admits that, at that point, the people of Kelluyo were upset because thus far all of the jobs from the Santa Ana Project had gone to the Huacullani communities.[344] According to Mr. Swarthout, the situation degenerated into a "subsequent invasion" of the campsite because people had been drinking at the fair.[345] The participants allegedly "caused minimal damage" and left an expensive drill core untouched.[346] According to Mr. Swarthout, the "protesters" only stole a pickup truck and several laptops, and one of the supervisors was hurt during the "disturbance."[347] Mr. Swarthout describes this event as a "normal one" for miners and states that there was no "lingering animosity."[348]

198. What is striking about Mr. Swarthout's statement in this arbitration, however, is that it is a stark contrast to a contemporaneous letter that he sent to MINEM in December 11, 2008, and to how his employees described the events to the Prosecutor's Office (*Fiscalía*) at that

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[342] Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 6 [Anexo R-324]

[343] *See* Swarthout Second Witness Statement at para. 35.

[344] *See* Swarthout Second Witness Statement at para. 35.

[345] Swarthout Second Witness Statement at para. 35.

[346] Swarthout Second Witness Statement at para. 35.

[347] *See* Swarthout Second Witness Statement at para. 35.

[348] Swarthout Second Witness Statement at para. 36.

time. Mr. Swarthout sent a letter to the DGAAM on December 11, 2008 describing the events that occurred at the campsite on October 14, 2008. According to the letter:

> On October 14 [of 2008], *approximately 2,000 people violently entered the camp* where our company is conducting exploration activities for our "Santa Ana" project . . . This events were caused by people that live outside the communities that have presence and hold rights in the area of our exploration project, with whom we had been (and continue) working in amity and harmony. These events resulted in the *lamentable burning, looting and destruction of our campsite for exploration* . . . Because of [the incident], our company decided to *slow down the exploration process to ensure the security and integrity of our personnel* . . . .[349]

199. So at the time, Mr. Swarthout did not describe the invasion of the campsite was a harmless lark by a handful of intoxicated fair attendees who wanted to get back at Bear Creek for not giving them jobs. He described a large-scale, organized protest where at least 2,000 people participated to march against the Santa Ana Project. The event was so serious that Bear Creek had to delay its activities to protect its employees from any further attacks. According to local community members that spoke about the incident, Bear Creek withdrew until January 2009.[350] Obviously, the incident was not nearly as innocuous as Mr. Swarthout now describes it.[351]

200. Bear Creek's employees who were present at the campsite on October 14 also gave contemporaneous testimony that confirms the seriousness of the incident. The *Fiscalía* collected testimony from nine different employees of all levels, including Bear Creek's Community Relations Manager. All of the employees agreed on the following facts:[352]

i. The company had already been alerted that the people of Kelluyo and Pizacoma (neighboring communities to Santa Ana) were organizing a protest against the

[349] Letter from Bear Creek to the DGAAM on the 2008 Campsite Burning, December 11, 2008, at p. 1 [Exhibit R-294].

[350] *See* Peña Second Report at para. 36 [Exhibit REX-008].

[351] Swarthout Second Witness Statement at para. 35.

[352] *See generally* Peña Second Report at paras. 22-35 [Exhibit REX-008].

mining project.[353] The company was aware of the animosity of these communities towards the Project, and requested the *Fiscalía* to inspect the campsite before the scheduled date for the protests, as a measure of prevention. Bear Creek feared that the protests could become violent.[354]

ii. Thousands of people (around 2,800-3,000) from Kelluyo and Pizacoma arrived in trucks and buses at 9:00 a.m. to Huacullani on October 14, 2008. Their sole purpose was to protest against Santa Ana; they chanted "Take Down the Mine" and "We Want the Mine to Leave." In Huacullani, representatives of the protesters gave several speeches at the town's central square, claiming that Santa Ana would contaminate water and land, and demanding its retreat from the area.[355]

iii. At around 11:00 am, the protesters started marching towards the Santa Ana campsite.[356] The protesters surrounded the campsite and engaged in violence.

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[353] *See* Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 5 [Exhibit R-324]; Deposition of Marco Antonio Maita Rodriguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-331]; Deposition of Guillermo Jorge Ramos Ochoa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 5 [Exhibit R-337]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-338]; Deposition of Julio Quino Saavedra, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-340]; Deposition of Miguel Ramos Fuentes, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-341]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 5 [Exhibit R-342]; Deposition of Rene Charles Tonconi Condori, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-343].

[354] *See* Prosecutors Resolution N° 468-2008-MP-2da.FPMCH-DESGUADERO, October 16, 2008 [Exhibit R-051*bis*].

[355] *See* Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-324].

[356] *See* Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-324]; Deposition of Marco Antonio Maita Rodriguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-331]; Deposition of Guillermo Jorge Ramos Ochoa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-337]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-338]; Deposition of Cesar Tapia Tumba, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-339]; Deposition of Julio Quino Saavedra, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-340]; Deposition of Miguel Ramos Fuentes, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-341]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-342]; Deposition of Rene Charles Tonconi Condori, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-343].

> They threw rocks at the site and at anybody who worked for Bear Creek.[357] Four of the employees that were interviewed said they were assaulted (hit and kicked by several people) and threatened to be killed (or even be burnt alive). The protesters called them sellouts and stole their personal items.[358] The mob had no control and was very angry. They looted the site and then burned everything. The protesters left Huacullani at around 4:30 pm, more than seven hours after they arrived.[359]

201. Again, these contemporaneous accounts differ greatly from the sanitized description that Mr. Swarthout offers in this arbitration. These events involved thousands of community members, not a handful of individuals who had had a few too many drinks. These violent acts are evidence that Bear Creek did not have good, much less excellent, relations with

[357] *See* Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-324]; Deposition of Marco Antonio Maita Rodriguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-331]; Deposition of Guillermo Jorge Ramos Ochoa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-337]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-338]; Deposition of Cesar Tapia Tumba, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-339]; Deposition of Julio Quino Saavedra, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-340]; Deposition of Miguel Ramos Fuentes, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-341]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-342]; Deposition of Rene Charles Tonconi Condori, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-343].

[358] *See* Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito- Desaguadero, October 20, 2008, at question 4 [Exhibit R-324] Deposition of Marco Antonio Maita Rodriguez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-331]; Deposition of Guillermo Jorge Ramos Ochoa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-337]; Deposition of Basiana Bravo Zamalloa, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-338]; Deposition of Cesar Tapia Tumba, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-339]; Deposition of Julio Quino Saavedra, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-340]; Deposition of Miguel Ramos Fuentes, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-341]; Deposition of Leon Jorge Aguilar Gomez, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-342]; Deposition of Rene Charles Tonconi Condori, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 3 [Exhibit R-343].

[359] *See* Deposition of Miguel Angel Sancho Machaca, in Criminal File No. 277-2008-PE of the Second Provincial Prosecutors Office Chucuito-Desaguadero, October 20, 2008, at question 4 [Exhibit R-324].

the communities surrounding the Santa Ana Project, and they confirm Professor Peña's analysis that, by benefiting only a handful of communities, Bear Creek was creating differences between the communities and generating bitterness and hostility in the area.

202. In sum, Bear Creek was aware that a several thousands of its neighbors opposed the Project as early as 2008. In particular, the communities that would be affected by the Project (but did not get any benefits from it) evidently mistrusted the company from the outset, leading eventually to the 2011 widespread protests against mining generally and the Santa Ana Project specifically.

203. Playing down the impact of the events, Bear Creek nevertheless claims that the matter of the October 14, 2008 burning of its Project site was "settled amicably" and notes that the company even hired one of the individuals involved in the event to work on exploration activities.[360] And it is true that after Bear Creek returned to the site in 2009 and up until the beginning of 2011, there was an apparent general peace in the area. But that peace lasted only until the communities learned that the company was planning to start exploiting the mine. Once that became clear, the communities felt they had to fight for their rights and they eventually initiated the 2011 protests.

3. The February 2011 Public Hearing and Large-Scale Protests Outside It Confirmed That Many in the Surrounding Communities Rejected the Santa Ana Project

204. Bear Creek would like this Tribunal to believe that the public hearing it held on February 23, 2011 (the "Public Hearing") to formally present the proposed Santa Ana mine to the affected communities was a complete success. Mr. Antunez de Mayolo, who says that he attended the hearing although his name does not appear in the official minute (*acta*) of the

[360] *See* Claimant's Reply at para. 75.

hearing listing the company's representatives,[361] describes it as a "success" and as evidence that the communities supported the Project.[362] But the evidence shows otherwise. Bear Creek and Mr. Antunez de Mayolo omit or mischaracterize several events that took place inside and outside the Public Hearing that evidenced the growing hostility and objections from the communities toward the Santa Ana Project.

205. First, according to Mr. Antunez de Mayolo, Bear Creek distributed handouts explaining the Project, and had the assistance of a translator from Spanish to Aymara.[363] Prof. Peña, who interviewed community members that were present at the hearing, reports that although there was an Aymara translator at the hearing, the Aymara participants recall that the translation was extremely difficult to follow.[364] They also recall that the company presented the Project and answered the attendees' questions in highly technical terms that were hard to follow in Spanish, and much harder to follow when translated to Aymara—particularly for a population with a very low level of education. Attendees told Prof. Peña that most of them did not understand the explanations given by the company and that, as a consequence, their mistrust towards the company grew.[365]

206. Second, Mr. Antunez de Mayolo states that he sat in the audience among the attendees and he heard the majority of them firmly supporting the Project.[366] Mr. Antunez de Mayolo has not testified that he speaks Aymara, the predominant language spoken among the

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[361] *See* Minutes of the Public Hearing – Mineral Subsector No. 007-2011/MEM-AAm – Public Housing for the ESIA of the "Santa Ana" Project, February 23, 2011 [Exhibit C-0076].

[362] *See* Second Witness Statement of Elsiario Antunez de Mayolo, January 8, 2016 ("Antunez de Mayolo Second Witness Statement") at paras. 28, 32.

[363] *See* Antunez de Mayolo Second Witness Statement at para. 24.

[364] *See* Peña Second Report at para. 44 (iii) [Exhibit REX-008].

[365] *See* Peña Second Report at para. 44 c (ii), (iv) [Exhibit REX-008].

[366] *See* Antunez de Mayolo Second Witness Statement at paras. 24, 26.

communities present at the Public Hearing. If not, it would be hard to imagine how Mr. Antunez de Mayolo understood their internal conversations. By contrast, Prof. Peña was told that many people mistrusted the company and the Santa Ana Project, and that some people would never support the Project.[367]

207. Third, Mr. Antunez de Mayolo also claims that the hearing was filmed, and that the video would show that at the end the attendees applauded.[368] However, Respondent notes that Claimant decided to rely on Mr. Antunez de Mayolo's written testimony instead of producing that video, which should be in Claimant's possession. (As explained by Mr. Ramírez, the company is typically responsible of making a video of the hearing and keeping a copy of it.[369] Respondent does not have a copy of the video in its files.)

208. Fourth, according to Mr. Antunez de Mayolo there was only a small group of people outside the hearing site who opposed the Project—50 people who were sponsored by the Mayor of Desaguadero.[370] However, reports from others present at the hearing tell a very different story. According to them, there was a large and growing number of people outside the hearing site who were protesting against the Project.[371] Most of these people decided not to enter the hearing, apparently because they feared that if they provided their national registration number (which was required to enter the Hearing), it would be used as a sign of approval for the Project that they did not support.[372] (Indeed, that concern was arguably prophetic, given the claims that Bear Creek now makes about the significance of the hearing.) Prof. Peña was told

[367] *See* Peña Second Report at paras. 42, 44 (vii) [Exhibit REX-008].

[368] *See* Antunez de Mayolo Second Witness Statement at paras. 24, 26.

[369] *See* Ramírez Second Witness Statement at para. 23 [Exhibit RWS-006].

[370] *See* Antunez de Mayolo Second Witness Statement at para. 30.

[371] *See* Peña Second Report at para. 44 [Exhibit REX-008].

[372] *See* Peña Second Report at para. 44 [Exhibit REX-008].

that there were hundreds of people protesting outside the hearing—as many as 400 to 500, not the mere 50 that Mr. Antunez de Mayolo now recalls.[373]

209. It is not surprising that Bear Creek would try to understate the magnitude of the opposition inside and outside the Public Hearing. But the opposition to the Project that surfaced in 2008 was clearly in evidence once more at the February 23, 2011 Public Hearing. Even some middle ground between the reports on each side would put more than 200 protesters outside the meeting. There can be no question that there was very real opposition from the communities toward the Project.

210. Fifth, Mr. Antunez de Mayolo claims that the questions posed at the Hearing do not show that the people were concerned about the contamination the Project could cause, but rather show that they were simply curious about the Project.[374] Mr. Antunez de Mayolo focuses on a question that he says Mr. Aduviri asked, in order to argue that that particular opponent's questions were completely unrelated to the Project and that Mr. Aduviri just wanted to oppose the Project and promote his cause.[375] Mr. Antunez de Mayolo complains that Mr. Aduviri asked whether the company would use mercury, which is only used in gold mining. But that question, even if factually misguided, is not evidence of any ulterior motives or evidence that the communities' concerns about contamination were not sincere. Mr. Aduviri was not the only person asking about toxic materials and other risks. For example, the mayor of the town of Huacullani (a community that allegedly supported Bear Creek), similarly asked whether the company would use cyanide.[376] Indeed, the great majority of the questions asked at the Hearing

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[373] *See* Peña Second Report at para. 44 (i) [Exhibit REX-008].

[374] *See* Antunez de Mayolo Second Witness Statement at para. 27.

[375] *See* Antunez de Mayolo Second Witness Statement at para. 31; Antunez de Mayolo First Witness Statement at para. 16.

[376] Questions Raised the Santa Ana Public Hearing, February 23, 2011, at p. 1 [Exhibit R-054].

were related to how the company would control contamination.[377] The questions posed by the attendees at the hearing showed, first, how poorly informed they were about basic aspects of the Project and, second, that they were deeply concerned about possible contamination. Both of those were warning signs for Bear Creek—evidence that it would need to do much more to explain the Project and educate the communities about it, and that contamination concerns were at the forefront of the communities' minds and could not be dismissed merely because Bear Creek believed that they were wrong as a factual matter.

211. This is also confirmed by two letters submitted by Kelluyo communities to the School of Engineers of Perú, and the environmental section of the local prosecutor's office.[378] In the letter to the School of Engineers of Perú, the Kelluyo communities request help understanding Santa Ana's EIA, because they were not able to ask all of their questions at the Hearing or express all of their concerns, and the "representatives of the Santa Ana mine did not respond to [their] questions."[379] The letter to the local prosecutor's office specialized on environmental issues complains about Bear Creek's reluctance to acknowledge the communities' observations and opinions with respect to the Project.[380]

212. The very fact that Bear Creek treated the Hearing as a "success" and "celebrated" it—instead of seeing in the Hearing and the protests outside it serious red flags and a need for immediate action to address community concerns—is telling. The population had sincere and serious concerns, which Bear Creek needed to alleviate or, at a minimum, explain as part of the citizen participation process. Bear Creek failed to do so, and the communities' mistrust grew.

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[377] *See for example* Questions Raised the Santa Ana Public Hearing, February 23, 2011, at pp. 1, 2, 4, 7-16, 18, 20-22, 26, 35, 46, 47, 49-52, 55, 64-67, 69, 72, 79 [Exhibit R-054].

[378] *See* Letters from Kelluyo District on Santa Ana's Public Hearing, March 11, 2011 [Exhibit R-304].

[379] Letters from Kelluyo District on Santa Ana's Public Hearing, March 11, 2011, first letter, at p. 1 [Exhibit R-304].

[380] *See* Letters from Kelluyo District on Santa Ana's Public Hearing, March 11, 2011, second letter, at p. 1 [Exhibit R-304].

The Hearing proved to be the spark for growing community opposition to the Project that would erupt into massive protests. As described in the next Section, after the Public Hearing, the neighboring communities organized a series of meetings and protest events to actively demand the cancellation of all mining activities in the area, including Santa Ana. This created tension in the region that fueled the protests, which ultimately paralyzed the Department of Puno. But Bear Creek calls the Hearing a great success and claims that the ensuing protests had nothing to do with the Santa Ana Project. The analogy of "fiddling while Rome burns" is hard to avoid.

4. The Protests in March-June 2011 that Paralyzed the Department of Puno Targeted the Santa Ana Project

a. The Aymara communities had legitimate concerns about mining activities in the southern region of Puno

213. Between March and June 2011, the Department of Puno experienced an increasing situation of instability and even violence due to severe social unrest. These protests were significantly triggered by Bear Creek's efforts to move the Santa Ana Project toward construction and exploitation, which served as a sort of flashpoint in the South of Puno that tapped into a strong anti-mining sentiment in the South and then across the whole of Puno. Yet in its Memorial on the Merits, and again in its Reply on the Merits, Bear Creek tries to dismiss these protests as "not related" to the Santa Ana Project and as being mere political machinations by one person (Mr. Aduviri).[381] Bear Creek's description of the events is implausible. Record evidence and the testimony of witnesses to the events in Puno show the seriousness of the protests and confirm the patently obvious causal link between the Santa Ana Project and the social unrest. We will set out below the details of the protests and their links to Santa Ana, but in this regard perhaps a picture is most telling.

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[381] *See* Claimant's Memorial at para. 80; Claimant's Reply at para. 3.

214. Images from press reports about the social crisis in Puno illustrate the protesters' demands:

Figure 5. Image taken from news report on Aymara social conflict.[382]

Figure 6. Image taken from news report on Aymara social conflict.[383]

215. "No to the Santa Ana Mine. Long live the fight of the Aymara. People power!" "Yes to Agriculture, No to the Mine." "No to the Mine, Yes to Life." The images speak for themselves; the protests were directly related to the Santa Ana Project.

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[382] *See* "Perú: Aymaras Protest Transitional Mining Company", *Al Jazeera*, at (1:26), *available at* https://www.youtube.com/embed/BmMQ_0hWEQs uploaded on May 27, 2011 (last visited April 1, 2016) [Exhibit R-301].

[383] *See* "Mayors, Governors, and Population Reject Santa Ana" *Los Andes,* March 3, 2011 [Exhibit R-374].

216. Between March and June 2011, three fronts of protests erupted in Puno: two in the North and one in the South.[384] The protestors in each of these fronts had different claims and demands, but they had one common denominator: they fought to put a stop to mining activities in the Department of Puno.[385] The front in the South was the first to erupt, was the longest one, and was the one directly related to the Santa Ana Project. In its Counter-Memorial, Respondent described the events from all three fronts to explain to the Tribunal the complete context of instability and social unrest that the people of Puno endured in 2011, and that the Government sought to address in a comprehensive manner.[386] In this Rejoinder submission (and this Section), Respondent will focus on the events related to the southern front—the one directly related to the Santa Ana Project.

217. After the February 23, 2011 Public Hearing, the numerous communities that opposed the Project decided to organize a series of meetings to discuss their course of action to ensure the protection of their lands, their sacred places and their way of life.[387] On March 2, 2011 representatives of communities from the Districts of Kelluyo, Desaguadero, Pisacoma, Zepita[388] and Huacullani met in the city of Desaguadero (the main city in the area, on the border with Bolivia) to prepare written demands for the cancellation of all mining concessions in the

[384] *See* Respondent's Counter-Memorial at paras. 96-129; Witness Statement of Fernando Gala, October 6, 2015 ("Gala First Witness Statement") at para. 7 [Exhibit RWS-001]; Aide Memoire from *Defensoría* on Mining Concessions and Social Conflicts in Puno at pp. 2 [Exhibit R-305]

[385] *See* Second Witness Statement of Fernando Gala, April 4, 2016 ("Gala Second Witness Statement"), at para. 9 [Exhibit RWS-005].

[386] *See* Respondent's Counter-Memorial at paras. 96-129; Gala First Witness Statement at paras. 5-40 [Exhibit RWS-001]; Aide Memoire "Actions Done by the Executive Power Regarding Conflicts in the Puno Department," July 2011 ("Aide Memoire 2011") [Exhibit R-010].

[387] *See* Peña Second Report at para. 46 [Exhibit REX-008].

[388] All of these communities are neighboring communities to the Santa Ana Project. *See* Figure 3 *supra*. The communities of Kelluyo, Desaguadero and Pisacoma have opposed the Project since 2008. *See* Section D.1 *supra*.

South of Puno, and in particular for the cancellation of the Santa Ana Project.[389] Their main concern was the contamination they believed that mining activities could cause and how those activities would affect their sacred places and their main source of livelihood, the waterways.[390] Bear Creek claims that the Tribunal should disregard these letters because they are not legitimate and do not show the real voices of the Aymara population.[391] Bear Creek is mistaken on both counts.

218. First, Bear Creek tries to dismiss these letters by arguing that they were drafted by the Frente de Defensa de Recursos Naturales ("FDRN"—Mr. Aduviri's organization) and therefore do not speak for the local communities.[392] Prof. Peña explains that the FDRN is an alliance of local communities that was actually formed at these March meetings in an effort to present a coordinated front in the communities' anti-mining efforts. In that respect, the FDRN itself was an expression of the population's frustrations and concerns.[393] Moreover, regardless of who drafted the letters, what Bear Creek cannot escape is the fact that 372 community leaders, in representation of their communities, agreed to and signed the letters. The signatures speak for themselves. In addition, this was not the first time that the communities had raised their voices in opposition against the Santa Ana Project. Before the creation of the FDRN, and before Mr.

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[389] *See generally* Memorial submitted by Frente de Defensa and Kelluyo's Comunidades Campesinas to Congress, Memorial No. 0005, March 10, 2011 ("Memorial submitted by Frente de Defensa No. 005") [Exhibit R-015]; Memorials submitted by the Frente de Defensa and Kelluyo's Comunidades Campesinas to Ministry of Mines, Memorial No. 0002- 2011- CO-FDRN-RSP, March 10, 2011 ("Memorial submitted by the Frente de Defensa No. 002") [Exhibit R-017]; Memorials submitted by the Frente de Defensa and Kelluyo's Comunidades Campesinas to the President, Memorial No. 0001- 2011- CO-FDRN-RSP, March 9, 2011 ("Memorials submitted by the Frente de Defensa No. 001") [Exhibit R-016].

[390] *See* Memorial submitted by Frente de Defensa No. 005 at pp. 1-2 [Exhibit R-015]; Memorial submitted by the Frente de Defensa No. 002 at p. 2 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001 at p. 2 [Exhibit R-016].

[391] *See* Claimant's Reply at paras. 101-103.

[392] *See* Claimant's Reply at para. 101.

[393] *See* Peña Second Report at para. 46 [Exhibit REX-008].

Aduviri led the FDRN, a number of these communities had already participated in the October 2008 protests and in the February 23, 2011 protests that took place outside the Santa Ana Public Hearing.

219. Second, Bear Creek alleges that the concerns raised in the March 2, 2011 letters with respect to the Santa Ana Project and possible contamination were incorrect or factually unfounded, and on that basis, Bear Creek would like to dismiss them as not legitimate.[394] But Bear Creek misses the point—the question is not whether a given community concern is factually grounded or not, the question is what Bear Creek will do to address the concern. That may well include educating the community about the facts and about why the community need not be concerned about the issue that it has raised. But it is the company's responsibility to engage with the community about its concern and to work to resolve it. The company cannot say that a concern is illegitimate, or decide not to engage with the community about it, just because the company thinks the concern is factually unfounded or misguided.

220. As previously explained, the Aymaras of the South of Puno had no experience with any mining activities in their lands; and in contrast they saw the negative effects that these activities had on the Aymaras of the North of Puno. Moreover, their main economic activity is agriculture, and the protection of the Pacha Mama (Mother Earth) is a sacred responsibility for them. Therefore, any concern about the possibility of contamination of their waterways and water resources was legitimate because it could seriously affect their way of life and their sacred places. Even if Santa Ana posed no risk whatsoever to the waterways and water sources of the Aymaras, then, under Perú's citizen participation regime discussed below, it was Bear Creek's job to familiarize the population with the Project, to explain measures the company would adopt

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[394] *See* Claimant's Reply at para. 102.

to avoid contamination, and, if that explanation is persuasive, to obtain the approval and support of the communities. Bear Creek did not do this. As explained in Section C.2, Bear Creek apparently thought that if it gave jobs to a limited number of communities, that would be sufficient to obtain the social license required to develop the Project, whether or not other communities' concerns about environmental risks were ever addressed or assuaged. Bear Creek's strategy was either negligent or too naive. The communities' concerns were legitimate and required Bear Creek's attention.

221. Third, the March 2 letters include a set of letters from a Kelluyo community, signed by 61 community representatives, also voicing their opposition to the Santa Ana Project.[395] Bear Creek tries to dismiss the second set of letters by suggesting that they show that the root cause of that community's opposition was not Santa Ana, but a land dispute between Kelluyo and Huacullani.[396] Professor Peña explains in his second report that, while there does exist a land dispute between these Kelluyo and Huacullani communities, these letters are focused on the conflict regarding the Santa Ana Project and mining activities in the area, and not the land dispute.[397] According to Professor Peña, these letters are an example of why some communities opposed the Project—because they perceived that a neighboring community would reap the benefits of the Project, while they (who would be negatively affected by the Project) would not receive benefits.[398]

222. Fourth, the March 2 letters are not the only ones voicing the concerns of the communities with respect to the Santa Ana Project. The communities of Kelluyo, Zepita and

[395] *See* Memorial submitted by Frente de Defensa No. 005 at p. 19 [Exhibit R-015]; Memorial submitted by the Frente de Defensa No. 002 at p. 18 [Exhibit R-017]; Memorials submitted by the Frente de Defensa No. 001 at p. 30 [Exhibit R-016].

[396] *See* Claimant's Reply at para. 103.

[397] *See* Peña Second Report at para. 88 [Exhibit REX-008].

[398] *See* Peña Second Report at para. 88 [Exhibit REX-008].

Desaguadero also issued three separate letters complaining about the Santa Ana Project and mining activities in the South of Puno.[399] These letters evidence the high level of rejection against Bear Creek in the southern region and their concerns related to contamination and the protection of their sacred places. Moreover, the Huacullani communities that were not among the handful of communities benefitted by the Project also rejected it. A newspaper article from March 12, 2011 describes a protest organized by these communities during the last week of February 2011, in which the community members rejected the Project because they believed it would contaminate their lands.[400]

223. In sum, despite Bear Creek's attempts to dismiss them, these March 2, 2011 letters—dated mere days after the Public Hearing that Bear Creek claims as evidence of its successful community relations efforts—voice the core demands of the Aymara communities during the protests in Puno: the cancellation of all mining concessions in the South of Puno; the cancellation of the Santa Ana Project; and the protection the Aymaras' sacred places. The March 2, 2011 letters mark the beginning of a very complicated time in Puno, as protests grew, became more frequent, and eventually paralyzed much of the region.

224. Prof. Peña describes that on March 22, 2011 there was a massive meeting (between 20,000 and 25,000 people) of members of communities from the Districts of Huacullani, Kelluyo, Zepita, Pizacoma, Pomata, Desaguadero, Ilave Yunguyo and Puno (all located in the South of Puno) to discuss the concerns of the population from the South with respect to mining activities in the area. [401]

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[399] *See* Letter from Zepita Community, March 2, 2011 [Exhibit R-412]; Letter from Desaguadero Community, [Exhibit R-411]; Letters from Kelluyo District on Santa Ana's Public Hearing, March 11, 2011 [Exhibit R-304].

[400] *See* "Huacullani Population Rejects the Santa Ana Project", Noticias Ser, March 9, 2011 *available at* http://www.noticiasser.pe/09/03/2011/puno/pobladores-de-huacullani-rechazan-proyecto-minero-santa-ana (last visited April 12, 2016) [Exhibit R-417].

[401] *See* Peña Second Report at para. 46 [Exhibit REX-008].

225. As described in detail in Respondent's Counter-Memorial,[402] between March and April 2011, thousands of Aymaras repeatedly made demands to the Regional President of Puno to prohibit all mining activities in Puno, to cancel all the mining concessions in the area, and to cancel the Santa Ana Project.[403] Given that the Regional President of Puno lacked the legal powers to meet any of the protesters' demands, in mid-April 2011 the protesters announced that there would be a two-day strike in the city of Desaguadero. That strike took place on April 25-26, 2011. The Desaguadero Bridge, the main point of transit for persons and goods between Bolivia and Perú, was completely blocked. The city was paralyzed, several people were injured, and one person died.[404]

226. On April 26, 2011, the Regional President of Puno sent a letter to the Minister of Energy and Mines requesting the central government to intervene in the situation. The language of the letter confirms that the claims of the protesters were directly related to Bear Creek's mismanagement of its community relations. The population did not trust the company, and expected that they would be negatively affected by the Project. In particular, the Regional President stated that mining activities in the South (where Santa Ana was the only active mining project) were being carried on:

> with little transparency and without due consultation of the affected populations. This generates a legitimate lack of trust among the population with respect to impact on the territories,

[402] *See* Respondent's Counter-Memorial at paras. 100-102.

[403] *See* "Elimination of Mining Activities in Puno is Proposed," *La República Newspaper South Edition*, March 9, 2011 [Exhibit R-057]; *see also* Human Rights and Environment Association, Chronology: Antimining Protests in the South Region-2011, 2011, at p. 4 [Exhibit R-058].

[404] *See* Gala First Witness Statement at para. 23 [Exhibit RWS- 001]; *see also* "Anti-mining Strike Results in Violence," *La República Newspaper South Edition,* April 27, 2011 [Exhibit R-060].

> violation of collective rights, and contamination of the environment.[405]

227. The Regional President then referred directly to Bear Creek and the relationship between the Santa Ana Project and the protests:

> The particular case is the one referring to the startup of exploration activities of the Santa Ana Mining Project belonging to Bear Creek Mining Company, located in the district of Huacullani, province of Chucuito. Reactions to said activities have intensified in the districts of Kelluyo, Pisacoma, Zepita, Desaguadero, and other districts of the southern zone of the Puno region, resulting in a series of demonstrations and public mobilizations in opposition to the activities of that company. . .[406]

228. In addition, the Regional President described the seriousness of the situation in Puno. The Regional President alerted the Minister that there could be an indefinite strike, and that there was a "serious risk to governability of the Puno region."[407]

229. In May 2011 the central Government got involved in trying to find a solution to the demands of the protesters and stabilize the region, as described in Section E.1 below. During that month, protesters grew angrier and the situation turned critical. At the end of May, tens of thousands of protesters invaded the city of Puno, which unfortunately resulted in violent acts on May 26, 2011. A police report of these events shows how problematic the situation was. The report states, for example, that on May 23, 2011, some 9,000 people arrived in Puno to protest against the mining activities; by May 24, 2011, there were an estimated 15,500 people protesting. They blocked main highways, a main street in Puno, the main entrances to the city, and the main

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[405] Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, at p. 1 [Exhibit R-018].

[406] Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, at p. 1 [Exhibit R-018].

[407] Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, at p. 2 [Exhibit R-018].

squares in the city, shouting “Agro Sí, Mina No” (“Yes to Agriculture, No to the Mine”). On May 26, the protesters not only looted government institutions, they destroyed commercial establishments, telephone booths, cars, etc. The situation was critical.[408]

230. The Ombudsman’s Office of Puno also described the seriousness of the conflict. On May 27, 2011 the Ombudsman’s Office of Puno sent a letter to the Prime Minister requesting that she adopt immediate measures to protect the rights of the population of Puno and to allow the presidential elections to occur. The letter warned of “the serious events. . .which *p*ut at stake the lives, integrity and property of people, as well as the course of the second r*o*und of elections.”[409]

231. Considering the chaotic situation, on May 30, 2011, the Prime Minister summoned the Regional President of Puno and the mayors of the towns involved to Lima. As a result of those meetings, the protests were suspended for a week to allow the second-round presidential elections to take place.[410] The agreements reached and the Government measures taken as a result of this meeting are detailed in Section E below. The protests resumed in June. At about that time, the protests broke out on the two northern fronts, escalating the conflict to new high levels, including 6 deaths at the Juliaca airport (the main airport in the region). The protests did not stop until the government adopted measures to address the legitimate concerns of the Aymaras.

b. <u>The protests in Puno were not mere political machinations</u>

232. Bear Creek tries to dismiss the entirety of these multi-month, multi-front, multi-city protests involving tens of thousands of people against mining in Puno and the Santa Ana

[408] *See* Police Report from 2011 on Violence in Puno, 2011, at pp. 396-394 [Exhibit R-306].

[409] *See* Letter from *Defensoría* to PCM on Conflict in Puno, May 27, 2011 [Exhibit R-307].

[410] *See* Witness Statement of Rosario de Pilar Fernández Figueroa, April 8, 2016 (“Fernández Witness Statement”), at para. 21 [Exhibit RWS-004].

Project in particular by claiming that they were really mere political machinations that were orchestrated by Mr. Walter Aduviri and the FDRN for his political benefit.[411] That is simply not the case. The anti-mining protests in the Department of Puno, including the ones in the South of the Department, were all motivated by the population's concerns about and discontent with mining activities in the area. As Prof. Peña explains, the Aymaras from the South, who were not used to having any mining activity in their lands, became frustrated and angered when they learned that mineral rights over most of their territory had been given away in mining concessions without prior consultations with the communities, and that a mining project (Santa Ana) could start mining soon, which they worried brought risks of contamination of land and water.[412]

233. Bear Creek's suggestion that one person or even one group brought about the protests for political purposes is absurd. Tens of thousands of people blocked two of the main cities of Puno for over a month, demanding solutions from the Government.[413] These thousands of people did not destabilize a whole region in order to serve the alleged political aspirations of one person. The Aymaras had strongly held concerns about mining activities, which they voiced during the protests and in petitions to the government. They were concerned that their lives would be seriously affected by the negative effects of mining. The Santa Ana Project specifically was the project the population was complaining about.

234. Bear Creek even accuses Respondent of misleading the Tribunal when describing the critical situation that Puno endured in 2011. According to Bear Creek, Perú has "conflate[d]

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[411] *See* Claimant's Reply at para. 112.

[412] *See* Peña Second Report at para. 20 [Exhibit REX-008].

[413] *See* Respondent's Counter-Memorial at paras. 109-129.

the three fronts of protests . . . to mislead this Tribunal."[414] But Respondent has not conflated the three fronts. It was Respondent that first explained the three separate strands of protests, each with different causes, but all with a common denominator—staunch and vocal opposition to mining activities. Moreover, the protests were all inextricably linked to similar feelings of fear that mining would harm the communities and anger that the communities' voices were not heard. Perú explained each of the three fronts to show that—contrary to Bear Creek's narrative that only "politics" and nothing of substance fueled the mining demonstrations—the Peruvian Government was dealing with a difficult crisis situation on multiple fronts that threatened the stability of the Puno region and even strained international relations with bordering Bolivia.

235. Perú also explained the three fronts to explain how Bear Creek was materially responsible for the conflict (at least the conflict in the South) that Puno endured in 2011. As Respondent's witnesses have all explained, the protests from the South arose directly out of opposition to the Santa Ana Project.[415] The Santa Ana Project was the first and only mining project in the area, and the company adopted a divisive and simplistic community outreach strategy that was insufficient to obtain the support (or even acquiescence) of all of the communities that would be affected by the Project. As consequence, the Aymara communities in the South rallied together and decided to protest in defense of their rights.

236. Bear Creek alleges that the burning and looting of the SUNAT offices in Puno on May 26, 2011 are evidence of the political nature of the protests. This is incorrect; those events are simply evidence of the degree to which the crisis had escalated by that point, and say nothing about what motivated the protests throughout March, April, May and June of 2011. As Prof.

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[414] Claimant's Reply at para. 111.

[415] *See* Zegarra Second Witness Statement at para. 16 [Exhibit RWS-007]; Gala Second Witness Statement at para. 9 [Exhibit RWS-005]; Ramírez Second Witness Statement at para. 39 [Exhibit RWS-006]; Fernández Witness Statement at para. 6 [Exhibit RWS-004].

Peña observes, all of the violent actions that occurred in May 2011 were lamentable, but perhaps they should not have been surprising in the face of a very frustrated population that had been protesting for over a month, but felt that their voices still were not being heard by the Government.[416]

237. Bear Creek also claims that the Peruvian Government "unequivocally" acknowledged the political nature of the protests and that no one was blaming Bear Creek for the protests.[417] Prime Minister Fernández and Vice-Minister Gala explain in their witness statements that at that time, the Government—respectful of investments and the rule of law, and ignorant of Bear Creek's constitutional violation—hoped to protect the Project and was trying to find a solution to the legitimate concerns of the Aymara population that would also allow the Santa Ana Project to keep pursuing the necessary licenses and permits.[418] The Government did not "unequivocally" acknowledge the political nature of the protests. Bear Creek's activities in Puno, and its failure to work with all of the affected communities materially contributed to a situation of deep instability in the region that the Government was forced to resolve.

5. If Bear Creek Were To Return Today, the Local Communities Would Again Reject the Santa Ana Project

238. Social tension is still present in the South of Puno due to the 2011 conflict. Bear Creek contends that the Huacullani communities with which it once worked have petitioned MINEM to allow the return of the company to the region to develop the Santa Ana Project.[419]

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[416] *See* Peña Second Report at paras. 49-58 [Exhibit REX-008].

[417] *See* Claimant's Reply at para. 119.

[418] *See* Fernández Witness Statement at para. 13 [Exhibit RWS-004]; Gala Second Witness Statement at para. 27 [Exhibit RWS-005].

[419] Memorandum from Members of the Huacullani District to MINEM, *Reactivación del Proyecto Santa Ana*, October 27, 2013 [Exhibit C-0119].

Bear Creek ignores once more the tensions that exist in the region and that would flare again if they were to return.

239. Evidence on the record shows that if Bear Creek were to return today to Santa Ana, another social conflict would likely erupt. In 2011, after Supreme Decree No. 032 was issued, a community of Huacullani submitted a document to the Ombudsman's Office of Puno warning the Office of potential conflicts and invasion of their community by other communities that could take place, because the communities rejected any potential presence of Bear Creek in the area.[420] In 2014 and 2015 the Ombudsman's Office of Puno once again received several letters alerting it to social conflict that would erupt if Bear Creek were to return to the area.[421]

240. Professor Peña confirm this situation.[422] The mere mention of Bear Creek in the region causes tension, and people are very careful and fearful about discussing the matter. Even though Prof. Peña has extensive experience with Aymara and other indigenous communities, he has encountered many obstacles in trying to obtain information and analyze the social dynamics of the 2011 events. People are only comfortable testifying anonymously because they even fear for their safety and the safety of their families, if their statements were to be reported and then misinterpreted in the region, despite the fact that they are telling the truth about the events that unfolded.[423]

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[420] Communities' Letters to *Defensoría* Alerting on Possible Conflict, 2011, at p. 2 [Exhibit R-344].

[421] Communities' Letters to *Defensoría* Alerting on Possible Conflict, 2011 [Exhibit R-344]; Communities' Letters to *Defensoría* Alerting on Possible Conflict, 2014 [Exhibit R-345]; Communities' Letters to *Defensoría* Alerting on Possible Conflict, 2015 [Exhibit R-346].

[422] *See* Peña Second Report at para. 93-94 [Exhibit REX-008]; *see also* Memorandum Requesting the Government to Respect 2011 Agreements with Puno Communities, April, 2014 [Exhibit R-420].

[423] *See* Peña Second Report at para. 93-94 [Exhibit REX-008].

E. THE GOVERNMENT WORKED IN GOOD FAITH TO QUELL AND ADDRESS ALL OF THE CAUSES OF THE PROTESTS

241. Section D above just described the evolution of the opposition to the Santa Ana Project in the South of Puno, the role it played in sparking the March-June 2011 protests, and the severity of the situation that emerged in Puno by May/June 2011 as all three fronts of the protests converged. This Section E takes up the tale of how the Peruvian Government responded in those months to the social crisis with which it was confronted.

242. Claimant complains about two Government measures that impacted the Santa Ana Project (*i.e.,* the May 30, 2011 temporary suspension of the review of its EIA, and the June 24, 2011 revocation of the public necessity declaration for Bear Creek) and alleges that those two measures were arbitrary and cannot be justified. Bear Creek also alleges that the sole purpose of the measures was to "appease the political 'southern front' protests led by Walter Aduviri and the FDRN."[424] Neither characterization is accurate. As previously described, Puno faced a chaotic social situation in 2011, which cannot possibly be reduced to political theater—the Puno crisis was caused by legitimate and strongly held popular concerns about the impact that mining activities (including Santa Ana) could have on the communities' land, water, and lives. The Government intervened in the situation to try to understand the protesters' concerns and demands, and ultimately it adopted a wide-ranging set of measures to address multiple causes of the protests and an assortment of the protesters' concerns. The Government acted appropriately in light of all the circumstances to secure peace and stability for the Puno Region.

243. Bear Creek focuses its description of the facts on these two measures, which are the ones most directly related to the Santa Ana Project, but in doing so, Claimant takes them out of context. This Section describes all the measures adopted by the Government in May and June

[424] Claimant's Reply at para. 137.

2011 in relation to the Puno protests. First, it describes the initial attempts by the Government to address and try to resolve the social uprising, such as the measures adopted as a result of the work sessions between the High-Level Commission and the protesters in May 2011. Next, it describes the full range of Supreme Decrees, including Supreme Decree No. 032, that were adopted by the Government in June 2011, arising out of the Government's discussions in Lima with the representatives of the communities from the three fronts of protest. All of these measures, not just Supreme Decree No. 032, were adopted in tandem, in a good faith effort to address the people's legitimate concerns and to deal with a critical situation.

1. Perú Attempted To Calm the Social Uprising Through Dialogue with the Protestors

244. As Respondent explained in its Counter-Memorial and discusses again in this Rejoinder, the Peruvian Government adopted necessary measures and took necessary actions to respond to and try to control a critical situation.[425]

245. The central Government became directly involved in the situation in May 2011, as requested by the Regional President of the Department of Puno. As described in Section D.4 above, on the second day of a paralyzing and violent strike in the city of Desaguardero, the Regional President appealed to the central Government to get involved and to try to resolve the crisis. The Regional President described the critical situation that was developing in Puno. He explained that the protests were obstructing trade and transportation in the region and that they created a serious risk to the governability of the Region.[426] In particular, the Regional President requested the suspension of the Santa Ana Project (confirming once again that the protests were

[425] *See* Respondent's Counter-Memorial at paras. 105-150.

[426] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, at pp. 1-2 [Exhibit R-018].

indeed related to that Project) to avoid the strikes that had been announced by the protesters if the government failed to cancel the Project.[427]

246. In response to this request, the Vice-Minister of Mines, Mr. Fernando Gala, held a meeting with the Regional President on May 6, 2011 in Lima.[428] At the meeting, the Regional President explained the frustration and anger of the population caused by the non-transparent relations between the communities and the mining company (Bear Creek). He explained that because the local communities were not used to any mining activities in the area, they lacked a minimum understanding of the impacts (good or bad) of mining activities. Bear Creek had failed to explain them to the population and to address their concerns with respect to the Santa Ana Project.

247. In response to the Regional President's concerns and requests, Vice-Minister Gala decided to send a delegation to Puno to try to explain to the population the process for reviewing Santa Ana's EIA, and the possible benefits they could receive from the Project.[429] This delegation arrived in Puno on May 9, 2011.[430] MINEM's delegation met with around 500 people in the city of Puno. The main purpose of that meeting was to explain that Santa Ana's EIA had not yet been approved, that it was still being assessed, and that the Ministry would consider all of the communities' concerns in the process of reviewing Santa Ana's EIA. The delegation wanted to convey that Santa Ana could not start operating until it received the green light from MINEM, which it could only possibly obtain after Bear Creek addressed all relevant concerns. The meeting failed, however. The protesters did not consider these "guarantees"

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[427] *See* Letter from the Regional President of Puno to the Minister of Energy and Mines, Letter No. 520-2011-GR-PUNO/PR, April 26, 2011, at pp. 1-2 [Exhibit R-018].

[428] *See* Gala First Witness Statement at para. 24 [Exhibit RWS-001].

[429] *See* Gala First Witness Statement at para. 24 [Exhibit RWS-001].

[430] *See* Gala First Witness Statement at para. 24 [Exhibit RWS-001].

sufficient and decided not to allow the continuation of the meeting.[431] The protesters then mounted an indefinite strike in the city of Desaguadero. Several roads were blocked, and Desaguadero Bridge was closed. The economic losses for the region were dramatic.[432]

248. In light of the increasingly critical situation, the government in Lima created a High-Level Commission on May 15, 2011.[433] This Commission was comprised of the Vice-Ministers of Mines, Interior and Agriculture, and a representative of the Presidency of the Council of Ministers ("PCM") was also present.[434] The purpose of this Commission was to initiate a dialogue with the protesters, listen to their demands, and seek a solution to the crisis.[435]

249. The High-Level Commission held three sessions with the protesters to try to resolve the situation. The first session was held in Puno on May 16-17, 2011 at the Offices of the Regional Government.[436] At that meeting, representatives of the protesters set out their main claims. At the end of the meeting, the protesters submitted four main demands:

i. Cancellation of all mining and oil concessions in the South of Puno;

ii. Cancellation of the Santa Ana Project;

iii. Repeal of Supreme Decree No. 083-2007-EM which had granted Bear Creek its declaration of public necessity; and

iv. The protection of the Khapia Hill, a sacred place for the Aymaras.[437]

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[431] *See* Gala Second Witness Statement at para. 10 [Exhibit RWS-005].

[432] *See* Gala Second Witness Statement at para. 11 [Exhibit RWS-005]; *see also* "Community Members Close Borders," *La República Newspaper South Edition*, May 11, 2011 [Exhibit R-063]; Honorio Pinto Herrera, *Mining Conflict in Santa Ana*, INVESTIGACIONES SOCIALES, Vol. 17 No. 31, November 15, 2013, at p. 214 [Exhibit R-048]; *see also* "Protesters March towards Puno to Demand an Ordinance" *La República Newspaper South Edition*, May 12, 2011 [Exhibit R-064].

[433] *See* Fernández Witness Statement at para. 17 [Exhibit RWS-004].

[434] *See* Fernández Witness Statement at para. 17 [Exhibit RWS-004].

[435] *See* Fernández Witness Statement at para. 17 [Exhibit RWS-004].

[436] *See* Gala First Witness Statement at para. 27 [Exhibit RWS-001].

[437] *See* Aide Memoire 2011, at p. 5 [Exhibit R-010].

The Commission informed the protesters that they would assess the demands and would propose solutions at the second session.

250. The second session was held on May 19-20, 2011, in Juliaca, another city in the Department of Puno.[438] Due to security reasons, it had to be held at a military base. Six thousand protesters had gathered in the city of Puno, which made it impossible to ensure the safety of the government officials if they had held the meetings in Puno.[439] At that second session, the government officials announced two measures to address the protesters' demands. First, the government adopted a Resolution declaring the Khapia Hill to be part of the Nation's Cultural Heritage, the consequence of which would be to prohibit any mining or drilling activity on the Hill.[440] Second, a multi-sectoral committee was constituted to study possible actions with respect to mining concessions.[441] These would have to be assessed on a case-by-case basis, to make sure that the concession owners' rights were also protected.

251. However, the protesters object to this second proposal as insufficient and insisted on their three initial demands related to mining concessions and the Santa Ana Project—including the cancellation of the Santa Ana Project. (The protesters seemed to agree that their fourth demand had been addressed with the Resolution protecting the Khapia Hill.) In the wake

[438] *See* Aide Memoire 2011 at p. 5 [Exhibit R-010].

[439] *See* MINEM, "For Lack of Security Dialogue Between High Level Commission and Leaders Failed," May 19, 2011 [Exhibit R-022]; Aide Memoire 2011 at p. 5 [Exhibit R-010].

[440] *See* Resolution Declaring Cultural Heritage, Viceministerial Resolution No. 589-2011-VM-PC-IC-MC, May 13, 2011 [Exhibit R-023].

[441] *See* Resolution Creating Multi-Sectorial Committee, Supreme Resolution No. 131-2011-PCM, May 21, 2011, at Arts. 1 and 2 [Exhibit R-024].

of this meeting, the protests continued to escalate and armed forces were sent to the region to help maintain peace.[442]

252. The third session of meetings with the High-Level Commission was held on May 25-26, 2011, again in Juliaca at a military base due to security reasons.[443] At this meeting, as an attempt to calm the protests and reach a situation that would allow reasonable dialogue, the High-Level Commission suggested that perhaps MINEM could pause the government's review of Santa Ana's EIA.[444] The protesters immediately rejected the suspension as insufficient. These third meetings had to be abruptly suspended because there was an imminent threat against the lives and physical safety of the commissioners.[445] Meanwhile, the strike and protests in Puno continued.

253. The security situation reached a critical peak at the end of May 2011. On May 25, around 15,500 people took over the city of Puno, and on May 26 violent protesters looted and burned the offices of SUNAT and the Comptroller in Puno, as already discussed above. The situation was unsustainable.

254. Bear Creek alleges that, up to that point, Government officials had assured it that its rights would be protected.[446] According to Bear Creek, the Government had characterized the protesters' demands as illegal or unconstitutional.[447] Bear Creek claims, for example, that Prime Minister Fernández had personally assured them that their rights would be protected. However,

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[442] *See* MINEM, "Vice-Minister of Mines Asks the Authorities of Puno to Promptly Name Representatives to the Multi-Sectorial Committee," May 23, 2011 [Exhibit R-069]; *see also* Resolution that Authorizes Intervention of Armed Forces in Puno, Supreme Resolution No. 161-2011-DE, May 22, 2011 [Exhibit R-070].

[443] *See* Gala First Witness Statement at para. 29 [Exhibit RWS-001].

[444] *See* Gala First Witness Statement at para. 29 [Exhibit RWS-001].

[445] *See* Gala Second Witness Statement at para. 10 [Exhibit RWS-005].

[446] *See* Antunez de Mayolo Second Witness Statement at para. 48.

[447] *See* Claimant's Reply at paras. 115-118.

Ms. Fernández remembers the focus of the meeting rather differently. She testifies that she explained to Bear Creek's representatives that it was their responsibility to secure the necessary social license (community support), if they wanted the Project to be successful.[448] Bear Creek failed to follow Ms. Fernández's advice, and the conflict with the communities grew stronger.

255. Bear Creek also neglects to explain that when government officials characterized the protesters claims as illegal and unconstitutional, they were referring to the Government's inability to simply cancel mining concessions, as demanded by the protesters, *if* the concessions had been lawfully acquired.[449] Mining law expert Dr. Rodríguez-Mariategui also explains that Peruvian mining concessions are not absolutely irrevocable.[450] According to Perú's Mining Law, a mining concession is only irrevocable if the holder has complied with its legal obligations to maintain the validity of the concessions.[451] Thus, at the moment when the Peruvian Government officials made such statements, as Mr. Gala and Ms. Fernández explain, they did not know of Bear Creek's possible constitutional violation.[452] In other words, at that time, they were acting under the understanding that Bear Creek had acted lawfully. Moreover, to this day, the Peruvian Government has not cancelled Bear Creek's concessions.[453]

256. While the government was actively searching for a solution, Bear Creek, in contrast, did not do anything to calm the protests. Bear Creek moved its permanent information

[448] *See* Fernández Witness Statement at paras. 12-14 [Exhibit RWS-004].

[449] *See* Gala Second Witness Statement at paras. 24-27 [Exhibit RWS-005].

[450] *See* Rodríguez-Mariátegui Second Report at paras. 19-20 [Exhibit REX-009].

[451] *See* Rodríguez-Mariátegui Second Report at paras. 19-21 [Exhibit REX-009].

[452] *See* Gala Second Witness Statement at para. 25 [Exhibit RWS-005]; Fernández Witness Statement at para. 14 [Exhibit RWS-004].

[453] Respondent notes that there is currently a judicial proceeding initiated by MINEM requesting the judge to find that the transfer of the Santa Ana concessions to Bear Creek was inappropriate. If the judge finds in favor of MINEM, Bear Creek will lose the concessions because it acted illegally, not because of an act of expropriation. *See* Resolution that Orders Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM, June 28, 2011[Exhibit R-028]; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011[Exhibit C-0112].

office away from the Project site to the Huacullani town center in May, and otherwise left the area. Apparently the company believed that it was solely up to the Government to resolve the social crisis, despite its Project's central role in the situation.[454] Bear Creek claims that the Peruvian Government never approached it to request assistance or discuss a possible solution, and that was never officially informed of the meetings held with the protesters in May in Puno.[455] Those meetings were publicly announced, and Bear Creek was surely aware of the developments in Puno given the extensive press coverage at the time (as nicely illustrated by the number of press articles that Bear Creek cites as exhibits). If Bear Creek had any intention to be part of the solution, it should have approached the Government to offer its assistance or even to offer possible solutions. It did not.

257. Returning to the chronology of measures adopted: Faced with the failure of the third Commission meeting and the May 25-26 violence in Puno, in the last days of May, Prime Minister Fernández invited local representatives from Puno to Lima to discuss possible solutions. Vice-Minister Gala and the Minister of Mines, Pedro Sánchez, were present at that meeting. After listening to and engaging with the local representatives, the Government agreed to adopt the following measures:

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[454] See Letter from Bear Creek to F. Ramirez, May 11, 2011 [Exhibit C-0172]; Antunez de Mayolo Second Witness Statement at para. 51. Although Mr. Antunez de Mayolo claims that this was done because it "was more convenient . . . given the next phase of construction," this explanation differs from that provided in Mr. Antunez de Mayolo's contemporaneous letter, which explains that Bear Creek is moving the office "given that on this date we are vacating the facilities." Letter from Bear Creek to F. Ramirez, May 11, 2011, at p. 1 [Exhibit C-0172]. Moreover, although Mr. Antunez de Mayolo implies that the location change for the permanent information office was always planned as the project continued to progress, the Citizen Participation Plan does not reference such a change and instead notes explicitly that the permanent information office will be "located in the Santa Ana campsite. . . because it is on the transit way between Huacullani and Kelluyo, providing a service to the AID and AII." Citizen Participation Plan at Sec. 2.3.3 [Exhibit C-0155].

[455] *See* Claimant's Reply at para. 120.

v. Supreme Decree No. 026 of 2011, which suspended the admission of any new requests for mining concessions in the south of Puno for 12 months.[456]

vi. Supreme Resolution No. 142 of 2011, which extended the scope of Supreme Resolution No. 131 creating the multi-sector committee to study possible actions with respect to mining activities in the south of Puno. This amendment provided that decisions taken by the committee would be binding.[457]

vii. Directoral Resolution No. 162 of 2011, which suspended MINEM's process for reviewing Santa Ana's EIA for exploitation activities for one year in order to allow time for calm to be restored.[458]

258. In response, the local representatives from Puno agreed to suspend the protests to allow the second round of voting in the presidential elections take place.[459]

259. The Government adopted these measures as an attempt to address the causes of the protests and thereby try to return stability to the region. The Government had a duty to guarantee the citizens' right to have a democratic and peaceful election. Contrary to Bear Creek's conspiracy theories, the Government did not adopt these measures and calm the protests in order to favor a certain presidential candidate. That would have made no political sense, given that the candidate who appeared poised to win in the Puno Department was part of the opposition to the García administration that was then in power.

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[456] *See* Decree Suspending Admissions of New Mining Requests in the Provinces of Chucuito, El Collao, Puno and Yunguyo in the Puno Department, Supreme Decree No. 026-2011-EM, May 29, 2011, Art. 1 ("Supreme Decree No. 026") [Exhibit R-025].

[457] *See* Resolution that Extends the Scope of the Multi-Sectorial Committee, Resolution No. 142-2011-PCM, May 29,2011, at Arts. 1-2 [Exhibit R-026].

[458] *See* DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-0098]; *see also* Witness Statement of César Zegarra, October 6, 2015 ("Zegarra First Witness Statement"), at para. 19 [Exhibit RWS-003]; Ramírez First Witness Statement at paras. 30-34 [Exhibit RWS-002]; *see also* PCM Report on Puno Conflict, Report No. 05-2011-PCM/OGSS, May 30, 2011 [Exhibit R-418].

[459] Claimant alleges that the suspension of the protests had been because of a secret meeting between Aduviri and the opposition candidate, Mr. Ollanta Humala. *See* Claimant's Reply at para. 113. These are only conspiracy theories that have no support. Neither Ms. Fernández or Mr. Gala have any knowledge of this alleged secret meeting. *See* Gala Second Witness Statement at para. 26 [Exhibit RWS-005]; Fernández Witness Statement at para. 23 [Exhibit RWS-004].

260. Unfortunately, the Government's measures announced at the end of May still did not satisfy the protesters, and they resumed the strike on June 8, 2011. Between May 30 and June 14, 2011, the two additional northern fronts of anti-mining protests erupted in Puno. As previously explained, these two fronts from the North of Puno were not related to the Santa Ana Project, but they had a common cause with the southern front of protests—the concern over potential contamination by mining activities in Puno.[460] In addition, on June 7, 2011, the Peruvian Government received a note of protest from the Bolivian Government stating its concern about the conflict in Puno and the repercussions it was causing for commercial sectors in Bolivia.[461]

261. Prime Minister Fernández decided to invite representatives of the protesters again to Lima to try to avert any further violence. Between June 17 and 24, 2011, local representatives of the three fronts of protests met with government officials at different locations in Lima. Four Government measures resulted from these meetings: Supreme Decree No. 028-2011-EM, Supreme Decree No. 032-2011-EM, Supreme Decree No. 033-2011-EM, and Supreme Decree No. 035-2011-EM. All of these measures were intended to address the population's legitimate concerns, and to try to reach a solution to the chaotic social situation that the whole Department of Puno experienced in 2011. These measures are discussed next.

2. Perú Enacted Many Measures to Respond to the Social Crisis, Not Just the Two Measures of Which Bear Creek Complains

262. Bear Creek focuses on the May 30, 2011 temporary suspension of Santa Ana's EIA review and Supreme Decree No. 032 of June 24, 2011 as the two measures that it says breached the Perú-Canada FTA. But it is important to keep in mind that, as was just described,

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[460] *See* Gala Second Witness Statement at para. 9 [Exhibit RWS-005].

[461] *See* Note of Protest from the Government of Bolivia, June 7, 2011 [Exhibit R-075].

these two measures were not adopted in isolation. They were adopted in tandem with three regulations on May 30 and four other Supreme Decrees between June 23 and 25 that all worked to address the local communities' concerns about mining concessions in the Department of Puno, the communities' rights as indigenous people to prior consultation on natural resource development on their lands, and responding to contamination that had already occurred (mostly in the North of Puno) due to mining activities.

263. First, to address the local communities' concerns about mining concessions in the Department of Puno, the Government adopted Supreme Decree No. 032 and Supreme Decree No. 033. One of the key demands of the protesters was their request to stop all mining in the region. Supreme Decree No. 032 revoked the earlier Supreme Decree that had granted Bear Creek's declaration of public necessity (which is Claimant's chief complaint). But that was not all that it did. It also provided that the Government would adopt measures within 60 days to prohibit *any* mining activity in the districts of Huacullani and Kelluyo.[462] This measure was a reasonable measure adopted by the Government, as explained in detail in Section F.2 below.

264. At the same time, Supreme Decree No. 033 extended the provisions of Supreme Decree No. 026, an earlier Decree adopted on May 29, 2011, that suspended all applications for new concessions for certain areas in the South of the Department of Puno for a period of 12 months.[463] Supreme Decree No. 033 extended that suspension of new applications for mining concessions to the entirety of the Puno Department, and provided that the suspension would now stay in place for 36 months.[464] (This suspension was extended for three more months in 2014.[465])

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[462] *See* Supreme Decree No. 032-2011-EM, June 25, 2011, at Arts. 1-3, and Complementary Provision [Exhibit C-0005].

[463] *See* Supreme Decree No. 026 at Art. 1 [Exhibit R-025].

[464] *See* Supreme Decree on the Adjustments of Mining Petititions and Suspension of Admissions of Mining Petitions, Supreme Decree No. 033-2011-EM, June 25, 2011 ("Supreme Decree No. 033"), at Art. 3 [Exhibit R-011].

265. Second, to address the local communities' concerns about their rights to prior consultation, the Government adopted Supreme Decree No. 033 and Supreme Decree No. 034. In addition to the suspension of new applications just noted above, Supreme Decree No. 033 provided that, with respect to mining concessions that had already been granted, MINEM or the Regional Government had to engage in a new round of consultations with the communities within the project's area of influence in accordance with International Labor Organization ("ILO") Convention No. 169.[466] With respect to future mining concessions, Supreme Decree No. 034 provided that no mining activity (exploration or exploitation) in Puno will be authorized unless local communities have been previously consulted, consistent with Convention No. 169 of the ILO.[467]

266. Third, to address the local communities' concerns about mining-related contamination that afflicted communities in(particularly in the North of the Puno Department), the Government adopted Supreme Decree No. 28 and Supreme Decree No. 035. Supreme Decree No. 028 declared the protection of the Ramis River Basin to be a public necessity and a national interest.[468] As Respondent explained in its Counter-Memorial, that area had long suffered from the harmful effects of illegal mining operations and the contamination caused by

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[465] *See* Decree that Extends the Suspension of Admissions of Mining Petitions, Supreme Decree No. 021-2014-EM, July 27, 2014, at Art. 1 [Exhibit R-140].

[466] *See* Supreme Decree No. 033 at Arts. 1-2 [Exhibit R-011].

[467] *See* Gala First Witness Statement at para. 36 [Exhibit RWS-001]; *see also* Zegarra First Witness Statement at para. 29 [Exhibit RWS-003]; Decree that Issues Provisions With Respect to Mining and Oil Activities in the Puno Department, Supreme Decree No. 034-2011-EM, June 25, 2011, at Art. 1 [Exhibit R-027]. *See also* International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), September 5, 1991, at Art. 15 [Exhibit R-029]. (ILO Convention No. 169 requires, in relevant part, that governments "shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands.")

[468] *See* Decree that Declares the Recovery of the Ramis River, a National Interest and an Environmental Priority, Emergency Decree No. 028-2011, June 17, 2011 ("Emergency Decree No. 028"), at Art. 1 [Exhibit R-013].

them.[469s] Supreme Decree No. 035 provided mechanisms to finance programs that had been adopted to remediate the Ramis River basin under Emergency Decree No. 028 of June 17 2011.[470]

267. In sum, the Government adopted necessary measures to address legitimate concerns of the people of Puno, and in the hopes of restoring peace after months of strenuous civil strife.

F. BOTH THE TEMPORARY SUSPENSION OF THE REVIEW OF BEAR CREEK'S EIA AND SUPREME DECREE NO. 032 WERE APPROPRIATE, LEGITIMATE, AND PROPORTIONAL MEASURES

268. In its Reply, Claimant complains that the suspension of the EIA process and Supreme Decree No. 032 were enacted to "appease the political southern front protests," as if responding to legitimate demands for social justice and securing internal security and public order were a basis for condemning government measures.[471] Claimant also alleges that Respondent acted arbitrarily and failed to act transparently when it suspended the EIA process and when it enacted Supreme Decree No. 032.[472] None of these characterizations is true. As Respondent has explained, both measures were adopted among an array of interrelated measures to address legitimate concerns of the people of the Puno Department about mining activities in their region. Perú did not single-out Santa Ana, nor was Bear Creek some innocent bystander victimized by unrelated political developments. As Mr. Ramirez explains, the EIA process was suspended in order to *secure* Bear Creek's rights, and, as then Prime Minister Fernández explains

[469] *See* Respondent's Counter-Memorial at paras. 128,134.

[470] *See* Decree that Complements Emergency Decree No. 028 of 2011, Supreme Decree No. 035-2011-EM, June 26, 2011 ("Supreme Decree No. 035"), at Art. 2 [Exhibit R-014]; *see also* Gala First Statement at para. 15 [Exhibit RWS-001]; Zegarra First Witness Statement at para. 30 [Exhibit RWS-003]; Aide Memoire 2011 at p. 17 [Exhibit R-010].

[471] Claimant's Reply at para. 137.

[472] Claimant's Reply at paras. 141-145.

in her witness statement, Supreme Decree No. 032 was an appropriate measure taken because of a critical social situation caused at least in part by Bear Creek own actions and an apparent constitutional violation perpetrated by Bear Creek.[473]

269. In this Section, Respondent first discusses the legality and appropriateness of the suspension of Santa Ana's EIA as a precautionary measure adopted in May 2011. Second, Respondent reiterates the reasons why Supreme Decree No. 32 was issued to demonstrate that it was neither arbitrary nor contrary to Peruvian law. Respondent also explains that Supreme Decree No. 032 was issued in accordance with Peruvian law, as confirmed by two Peruvian law experts, Dr. Francisco Eguiguren and Dr. Jorge Danos.

1. The Temporary Suspension of the EIA Review So That It Could Proceed in Calmer Times Was Legal, Reasonable, and Appropriate

270. After the Peruvian Government listened to the concerns of the Aymara communities in multiple meetings, and after watching the situation in Puno deteriorate rapidly, the DGAAM decided that it was necessary to suspend its review of Bear Creek's EIA. As Mr. Ramirez explained in his first witness statement, suspension is a measure that government agencies may take to protect the integrity of the decision-making process.[474] In the case of the Santa Ana Project's exploitation-stage EIA, the DGAAM determined that suspension of the process was the best option in light of the "social upheaval, violence and instability" in the areas surrounding the Santa Ana Project.[475]

271. Claimant argues that suspension of the EIA was illegal under Peruvian law because the DGAAM failed to demonstrate that Bear Creek was responsible for the social unrest

[473] *See* Fernández Witness Statement at para. 3 [Exhibit RWS-004]; *see also* Ramírez Second Witness Statement at paras. 38-39 [Exhibit RWS-006].

[474] *See* Ramírez First Witness Statement at para. 30 [Exhibit RWS-002].

[475] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-0098]. *See also* Ramírez First Witness Statement at paras. 31-32 [Exhibit RWS-002].

that motivated the suspension.[476] Claimant's mining law expert, Dr. Hans Flury, asserts that the suspension was illegal because it "did not relate the [social unrest and protests] to the company's conduct."[477] However, Dr. Flury does not cite to *any* Peruvian legal authority for this proposition; he simply invents the requirement out of whole cloth. When Bear Creek challenged the EIA suspension before the Consejo de Minería, the body that hears administrative appeals of MINEM decisions, Bear Creek made the same argument, and also failed to refer to any relevant legal authority.[478]

272. As Perú's mining law expert Dr. Rodriguez-Mariátegui explains, a Government agency does not have to show that the company whose administrative process is suspended caused the situation that threatens the legitimacy of the administrative decision-making process.[479] The law allows for a Government agency to suspend a proceeding "if there exists the possibility that without adopting [the preventative suspension] the efficacy of the resolution to be emitted is at risk."[480] The agency must support this decision with balanced reasoning.[481] There is no requirement in the law that the company *cause* the threatening situation because the preventative measures are not meant to punish the applicant, but rather to preserve the legitimacy and integrity of the Government's decision-making process.[482] Claimant's only argument against the suspension is therefore unfounded.

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[476] *See* Claimant's Reply at para. 3.

[477] Flury Report at para. 81.

[478] *See* Administrative Appeal for the Suspension of the EIA, June 17, 2011, at para. 7 [Exhibit R-308].

[479] *See* Rodríguez-Mariátegui Second Report at paras. 104-106 [Exhibit REX-009].

[480] General Administrative Procedure Law, Law No 27444, at Art. 146.1 [Exhibit R-104].

[481] *See* General Administrative Procedure Law, Law No 27444, at Art. 146.1 [Exhibit R-104].

[482] *See* Rodríguez-Mariátegui Second Report at paras. 104-106 [Exhibit REX-009].

273. Even if the legality of the EIA suspension depended on "relat[ing] the [social unrest and protests] to the company's conduct,"[483] as Dr. Flury claims, that requirement clearly would have been met in this case. As described above,[484] the protestors in the Puno region demanded the rejection of the Santa Ana EIA, the closure or cancellation of the Santa Ana Project, and the end of mining concessions and mining activities in the region. Clearly the social unrest "relate[d] . . . to the company's conduct." Mr. Ramirez confirms that the DGAAM understood that the protestors had serious concerns about the Santa Ana Project,[485] which is reflected in the DGAAM report at the time that analyzed the situation and recommended the temporary suspension.[486]

274. The decision to suspend the EIA review was also well-reasoned and a proportional response to the chaotic situation in Puno. The DGAAM observed the social unrest in the Puno region and determined that, in such a climate, the efficacy of its EIA decision (whether it might turn out to be for or against approving the EIA) was at serious risk.[487] The DGAAM hoped that a cooling-off period of one year could help to calm the situation so that the review of the Project could proceed under more reasonable conditions.[488] As Mr. Ramírez explained in his first witness statement, the DGAAM consulted the applicable legal norms to find a solution to the problem and it made a thoughtful decision based on careful consideration of

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[483] *See* Flury Report at para. 81.

[484] *See* paras. 213-231 *infra*

[485] *See* Ramírez Second Witness Statement at para. 40 [Exhibit RWS-006].

[486] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-0098] ("Currently there exists a situation of social commotion, violence, and instability in the area of the districts of Huacullani and Kelluyo, province of Chucuito, department of Puno, impact and influence zones of the "Santa Ana" project, that is translating into an indefinite strike as well as threats of violent acts against public and private property, *demonstrating their opposition to the process of the environmental impact study of the "Santa Ana" mining project* . . . .") (emphasis added).

[487] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-0098].

[488] *See* Ramírez Second Witness Statement at para. 39 [Exhibit RWS-006].

law and fact.[489] Moreover, in an atmosphere of social unrest, it would have been extremely difficult in any event for Bear Creek to conduct the remaining steps that were going to be needed in order to possibly achieve approval of the EIA. And furthermore, as Dr. Rodriguez-Mariátegui explains, if the EIA were approved but Bear Creek failed to begin construction of the mine for three years (for example, if blocked by further community protests), then the EIA approval would expire and Bear Creek would have been required to begin the process over again.[490] Bear Creek should have seen the temporary EIA suspension for what it was: an opportunity to reinvigorate its community outreach and re-dedicate itself to earning the trust of the protesting communities so that the EIA review could take place under better circumstances.[491] Bear Creek failed to take that initiative.

275. Perhaps because it has no basis to challenge the decision to suspend the EIA, Claimant focuses on and mischaracterizes the administrative appeal process in which Bear Creek challenged the suspension, in a misguided effort to argue that the Peruvian Government itself did not believe that the suspension had legal merit.[492] Claimant argues that the "DGAAM did not defend its position" during the administrative appeal proceeding before the Consejo de Minería,[493] which Mr. Antunez de Mayolo found to be "strange."[494]

276. The DGAAM's actions in this instance are not at all unusual, and if Mr. Antunez de Mayolo found them strange then that belies his inexperience with such proceedings. The

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[489] *See* Ramírez First Witness Statement at para. 32 [Exhibit RWS-002].

[490] *See* Rodríguez-Mariátegui Second Report at para. 107 [Exhibit REX-009].

[491] *See* DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011, at pp. 3-4 [Exhibit C-0098] (Suspension "will permit the company BE[A]R CREEK MINING COMPANY-SUCURSAL DEL PERU to continue with the relationship building with the authorities, the communities, and the population centers in the southern Puno zone about the scope of the mining project.").

[492] *See* Claimant's Reply at para. 123.

[493] Claimant's Reply at para. 124.

[494] Antunez de Mayolo Second Witness Statement at para. 44.

challenge that Bear Creek brought against DGAAM's EIA suspension was an administrative action before MINEM's Consejo de Minería. In such cases, the DGAAM simply transfers the relevant file to the Consejo de Minería for review, and the company presents its arguments against the decision.[495] Aside from transferring the documents in its formal file to the Consejo de Minería,[496] the DGAAM does not "defend" its actions. If the Consejo de Minería requests specific information from the DGAAM, the DGAAM will provide a response, but it does not make arguments against the company that brings the action.[497] The written file stands on its own. Claimant's suggestion that the DGAAM did not support its own decision to suspend the review of the Santa Ana EIA is completely unfounded. The support can be found in the DGAAM report,[498] shared at the time with Bear Creek,[499] that analyzed the facts and the law and arrived at the decision to temporarily suspend the review of the EIA.

277. Finally, Claimant has argued that it was deprived of a ruling on the legal merit of the EIA review suspension because, according to Claimant, the Consejo de Minería failed to hear the administrative challenge for three years due to questionable reasons.[500] Mr. Gala explains in his witness statement that this delay was in no way targeted against Bear Creek. Bear Creek's administrative appeal could not be reviewed by the Consejo de Minería because one of the five members of the Consejo had not been designated.[501] The Consejo requires a quorum of four members to hear an administrative appeal, so for the most part it was able to operate despite the

[495] *See* Ramírez Second Witness Statement at para. 41 [Exhibit RWS-006].

[496] The Consejo de Minería decision indicates that the Consejo de Minería reviewed the file provided by the DGAAM as a part of its review. *See* Mining Council Resolution No. 13-2014-MEM-CM, May 13, 2014, at p. 2 [Exhibit C-0168].

[497] *See* Ramírez Second Witness Statement at para. 41 [Exhibit RWS-006].

[498] DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-0098].

[499] *See* Ramírez First Witness Statement at para. 30 [Exhibit RWS-002].

[500] *See* Claimant's Reply at paras. 123-24.

[501] *See* Gala Second Witness Statement at paras. 28-30 [Exhibit RWS-005].

vacancy. But in Bear Creek's case, only three members were available to review the case because Mr. Gala, a member of the Consejo since 2011, had to recuse himself due to his involvement in the High-Level Commission and other events in Puno, in order to maintain the objectivity of the review process. The delay was an unfortunate procedural circumstance and had nothing to do with the merits of Bear Creek's pending case.[502] It was resolved in 2014 with the designation of the missing fifth member of the Consejo. In any event, if Bear Creek was prejudiced by or otherwise unhappy about the delay, it could have filed an *amparo* suit to challenge the process; it did not do so, apparently preferring instead to tack it on to Bear Creek's Treaty claims at the last minute

278. And although Claimant complains about the delay in the Consejo de Minería's decision on its administrative challenge, it should be noted that the challenge became entirely moot only one month after the suspension and only eight days after Bear Creek's filing of its administrative challenge,[503] when the Government issued Supreme Decree No. 032 on June 24, 2011 repealing the public necessity declaration. Upon the issuance of Supreme Decree No. 032, Bear Creek was no longer authorized to own mining concessions in the border region—in which case the EIA review itself was moot. The Consejo de Minería expressly recognized in its 2014 opinion that Bear Creek no longer had a public necessity decree and therefore could no longer possess title to mining rights within the border region.[504] Regardless of the amount of time that it took to ultimately hear and decide Bear Creek's appeal, it cannot seriously be argued that Bear

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[502] *See* Gala Second Witness Statement at para. 29 [Exhibit RWS-005].

[503] *See* Antunez de Mayolo Second Witness Statement at para. 44; Mining Council Resolution No. 13-2014-MEM-CM, May 13, 2014, at p. 2 (stating that Bear Creek filed its administrative challenge on june 17, 2011) [Exhibit C-0168].

[504] *See* Mining Council Resolution No. 13-2014-MEM-CM, May 13, 2014, at pp. 2-3 (describing the original public necessity decree, the supreme decree that revoked the public necessity decree, and the Constitutional prohibition against foreigners owning mining rights in the border region without such a decree) [Exhibit C-0168].

Creek was entitled to (and thus deprived of) a decision on its challenge within just eight calendar days after filing the appeal. But any delay after that point was harmless. The issue is therefore not relevant for this arbitration, and certainly cannot stand as an independent basis for a claim under the FTA.

2. Supreme Decree No. 032 Was a Legitimate and Proportional Response to the Massive Regional Protests and the Revelation that Bear Creek Had Unlawfully Acquired the Santa Ana Concessions

a. New circumstances made it impossible to maintain the Santa Ana Project's declaration of public necessity, leading to Supreme Decree No. 032

279. Supreme Decree No. 032 was a reasonable and proportionate measure adopted by the Government. To be clear, the Decree repealed Bear Creek's public necessity declaration, but it did not revoke or transfer title to Bear Creek's concessions.[505] Supreme Decree No. 032 states that the Government "became aware of new circumstances that extinguished a public necessity declaration."[506] High-level officials, such as Perú's Prime Minister, Rosario Fernández, Vice-Minister of Mines Fernando Gala and MINEM's Legal Director, César Zegarra, who were all involved in the decision making to adopt Supreme Decree No. 032, explain that this measure was adopted for two distinct but coinciding reasons.[507] First, Government officials learned that Bear Creek had acted through a Peruvian citizen under its control to indirectly acquire the Santa Ana concessions prior to obtaining a declaration of public necessity, leading them to believe that Bear

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[505] *See* Supreme Decree No. 032-2011-EM , June 25, 2011, at Art. 1 [Exhibit C-0005]. Respondent notes that there is currently a judicial proceeding initiated by MINEM requesting the judge to find that the transfer of the Santa Ana concessions to Bear Creek was inappropriate. If the judge finds in favor of MINEM, Bear Creek will lose the concessions because it acted illegally, not because of an act of expropriation. *See* Resolution that Orders Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM, June 28, 2011[Exhibit R-028]; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011[Exhibit C-0112].

[506] Supreme Decree No. 032-2011-EM, June 25, 2011, at Considerations [Exhibit C-0005].

[507] *See* Fernández Witness Statement at para. 3 [Exhibit RWS-004]; Zegarra Second Witness Statement at para. 15 [Exhibit RWS-007]; Gala Second Witness Statement at para. 6 [Exhibit RWS-005].

Creek had violated Article 71 of the Peruvian Constitution. Second, Bear Creek's presence in the South of the Department of Puno, instead of improving the welfare of the people of the region, had triggered and contributed to an unsustainable social crisis, whose effects can still be seen in the region. In these circumstances, continuing to call Bear Creek's presence in the border zone a "public necessity" was simply unsustainable.

280. Bear Creek argues that "neither of these two reasons can possibly justify Perú's enactment of Supreme Decree 032."[508] Bear Creek claims that the alleged "new circumstances" could not have been new because, according to Bear Creek, the Government already knew about the company's 2004-2007 scheme to acquire the mining concessions through its employee, and knew about the social conflict since at least May 2011.[509] Bear Creek's claims are again unfounded.

(i) The constitutional violation was not a "cover up"

281. Contrary to Claimant's allegations, Bear Creek's constitutional violation is neither an *ex post facto* justification nor a cover-up for the "real basis" for enacting Supreme Decree No. 032.[510] In particular, Claimant first contends that multiple government officials confirmed the legality of the company's acquisition, and thus that the State could not then claim that there was a constitutional violation. Second, Claimant contends that the State was aware of how they went about acquiring the mining concessions well before June 2011, and thus that this was not a new circumstance that could justify Supreme Decree No. 032. Bear Creek's allegations are meritless.

282. With respect to the alleged confirmations of legality from public officials, Bear Creek takes these alleged declarations out of context, most obviously disregarding the fact that if

[508] Claimant's Reply at para. 134.

[509] Claimant's Reply at paras. 134-135.

[510] Claimant's Reply at paras. 3, 20.

they were made, then they were made before these individual officials learned on June 23, 2011 that Bear Creek had circumvented Article 71 of the Constitution.[511]

283. First, Bear Creek alleges that Mr. Antúnez de Mayolo met with Vice-Minister Gala several times between March and June 22, 2011.[512] According to Mr. Antunez de Mayolo, at these meetings he explained to Mr. Gala the details of Bear Creek's acquisition of the Santa Ana mining concessions, and Mr. Gala never reacted to this information.[513] Even aside from the peculiarity of the fact that Bear Creek now claims it felt the need, in March, to discuss with Mr. Gala the details of its 2004-2007 acquisition, well before the acquisition's legality was even being questioned, Mr. Gala has explained that he does not remember discussing the details of Bear Creek's acquisition with the company's representative. Mr. Gala has also explained that, had he been inclined to confirm anything (he believes he did not), he would only have done so after discussing the matter with the Ministry's lawyers. Mr. Gala was in no position to confirm in an informal meeting whether the company had acted lawfully or not. In addition, Mr. Gala has declared that he did not know about the dependent relationship between Ms. Villavicencio and Bear Creek, or about Bear Creek's scheme to circumvent Article 71 through Ms. Villavicencio until June 23, 2011.

284. Second, Bear Creek also claims that its representatives met with Ms. Clara García Hidalgo, who also allegedly confirmed the legality of Bear Creek's acquisition scheme. Respondent has already explained in Section B.4 that, even if Ms. García ever said any such thing (for which we have no corroboration of Mr. Antunez de Mayolo's current testimony), Mr. Antúnez de Mayolo could not have reasonably relied on such a confirmation from Ms. García.

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[511] *See* Fernández Witness Statement at paras. 23-26 [Exhibit RWS-004]; Gala Second Witness Statement at paras. 20-22 [Exhibit RWS-005].

[512] *See* Claimant's Reply at para. 130.

[513] *See* Antunez de Mayolo Second Witness Statement at para. 54.

285. With respect to Bear Creek's contention that its relation with Ms. Karina Villavicencio had been known by the Government since 2006, Bear Creek's statements are misleading. According to Bear Creek, because (i) MINEM had received a copy of the option contracts executed between Bear Creek and Ms. Villavicencio; (ii) MINEM had received a copy of a registry document stating that Ms. Villavicencio was the company's representative, (iii) MINEM knew that Ms. Villavicencio was the owner of the Santa Ana concessions, and (iv) the Labor Ministry knew that Ms. Villavicencio was a Bear Creek employee, then MINEM was fully aware of Bear Creek's circumvention scheme since 2006 and could not later "discover" or complain about it in 2011.[514] This "connect-the-dots" theory is unsustainable.

286. First, Mr. Zegarra has explained that MINEM's officials do not review an application for a declaration of public necessity in search of possible legal violations; they assume the good faith of the applicant and focus their review on whether the proposed project would contribute to or pose any risks to Perú's welfare, in order to determine if they should recommend a declaration of public necessity to the Council of Ministers.[515] Second, Bear Creek omits the fact that this information was not provided in any direct or organized manner. This information is scattered in hundred of pages of the application. Only a person looking for a possible violation, who has some reason to search for a relationship between Bear Creek and Ms. Villavicencio, could have matched all of the documents to conclude that there was a constitutional violation. Third, Bear Creek never informed MINEM that Ms. Villavicencio was its employee when she applied for the concessions. MINEM had no reason or obligation to ask the Labor Ministry about Bear Creek's employees. But fourth and more importantly, Bear Creek never explained to MINEM, as it has now explained to this Tribunal, that Mr. Swarthout had in

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[514] *See* Claimant's Reply at para. 18; Letter from Claimant to Tribunal, March 7, 2016 [Exhibit R-385].

[515] *See* Zegarra Second Witness Statement at para. 21 [Exhibit RWS-007].

fact instructed Bear Creek's Geologist, César Ríos, to convince Ms. Villavicencio to apply for the concessions so that she could hold them prior to and while Bear Creek applied for the public necessity declaration.[516] Thus, MINEM did not know in 2006 of the constitutional violation.

287. Prime Minister Fernández, Vice-Minister Gala, and Mr. Zegarra have all confirmed that they personally learned about a possible constitutional violation on June 23, 2011—the last day of discussions in Lima with the representatives of the southern front of protests.[517] They testify that they were surprised when they learned that Bear Creek had circumvented the Constitution, because up to that point they had defended the Project on the understanding that its actions had been lawful. As described by them, on that day, a congressman for Puno who was participating in the meetings as representative of the affected communities along with other representatives of the Aymara communities, Mr. Yohnny Lescano, showed them documents that indicated that Bear Creek had used a Peruvian "front" or sham petitioner to acquire the mining concessions prior to obtaining the declaration of public necessity. After receiving this information, and in light of the crisis that Bear Creek's activities had fueled, the Prime Minister and the Council of Ministers decided that the appropriate and reasonable measure would be to repeal Santa Ana's public necessity declaration.[518] Contrary to Bear Creek's claims, there is nothing "perplexing" about the Government's actions to respond to Bear Creek's unlawful actions when acquiring the Santa Ana concessions.[519]

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[516] *See* Claimant's Memorial at paras. 20-21, 25; *see also* Swarthout First Witness Statement at paras. 15-18.

[517] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004]; Zegarra Second Witness Statement at para. 20 [Exhibit RWS-007]; Gala Second Witness Statement at para. 20 [Exhibit RWS-005].

[518] *See* Fernández Witness Statement at para. 24 [Exhibit RWS-004]; Gala Second Witness Statement at para. 20 [Exhibit RWS-005]; Zegarra Second Witness Statement at para. 16 [Exhibit RWS-007].

[519] *See* Claimant's Reply at paras. 125-131.

(ii) The critical social situation in Puno was a "new circumstance"

288. Bear Creek contends that the critical social situation that Bear Creek experienced on June 24, 2011 could not be considered a "new circumstance" that would justify Supreme Decree No. 032.[520] According to Bear Creek, as late as May 31, 2011 the Primer Minister, Vice-Minister of Mines, and the Minister of Energy and Mines had already discussed publicly the demands of the Puno protesters, and the looting and burning of public institutions had already occurred.[521] Claimant alleges that between May 31 and June 24 (when Supreme Decree No. 032 was adopted) no "new social situation erupted other than the continuation of the protests."[522] Bear Creek's theory is absurd. By Bear Creek's logic, the State should have repealed the Supreme Decree on May 31, 2011 (or on some earlier date when protesters demanded the cancellation of the Santa Ana Project) and that by June 24, 2011 it was too late to say that the Government was responding to the protests—which were *ongoing*.

289. The critical social situation of the entirety of March-June 2011 was a "new circumstance." In 2006, when Bear Creek applied for the public necessity declaration, any possible tension that existed among the surrounding communities was not noticeable, and had not become a conflict in the region. The Government issued Bear Creek's public necessity declaration under the impression of a peaceful environment in the region where the communities could potentially benefit from the mining project. In 2011, the situation was very different. Because of Bear Creek's failure to establish a sustainable relationship with the surrounding communities based on trust and cooperation and obtain a social license from them, the southern communities of Puno grew hostile to the Project and to all mining activities in the region. This

[520] *See* Claimant's Reply at paras. 135-136.

[521] *See* Claimant's Reply at para. 135.

[522] Claimant's Reply at para. 136.

situation developed into the 2011 Puno protests and violent acts. As explained in Sections D.2 – D.4 above, the protests were not political machinations, they were the expression of a frustrated population believing that they needed to protect their lands and ways of life.

290. Primer Minister Fernández and Vice-Minister Gala have explained that up to the very end of the discussions with the protesters, the Government's intention was to find a reasonable solution to the protesters' demands that also protected Santa Ana.[523] That was under the impression that Bear Creek had acted lawfully at all times. But, once they learned that Bear Creek had circumvented the Constitution, and in the face of the intractable critical social situation in Puno, the most appropriate measure was to determine that Bear Creek's Santa Ana Project was no longer a public necessity.

291. Contrary to Bear Creek's telling of the events, the Government did not do all of this because it caved in to the political machinations of one person, Mr. Walter Aduviri.[524] The Government issued Supreme Decree No. 032 because, by June 24, 2011, the 2007 public necessity declaration had lost its factual and legal basis. The alleged motivation that Bear Creek attributes to Perú makes no sense—why would an outgoing government give in to "political interests" in a remote part of Southern Perú that mostly supported the incoming government? On June 24, 2011 the election results were known, and the Garcia administration had only one month left in office. If the protests had been only a political device, the logical political move for the outgoing government would have been to leave the problem to the incoming government. But it did not do that, because this was not a political situation—it was a critical social situation that required immediate attention and resolution. The Government did what it could to solve a

[523] *See* Fernández Witness Statement at para. 15 [Exhibit RWS-004]; Gala Second Witness Statement at para. 27 [Exhibit RWS-005].

[524] *See* Claimant's Reply at paras. 135-137.

difficult social crisis in the area and to prevent more citizens from suffering or dying, while simultaneously protecting the integrity of its constitutional and regulatory regime regulating foreign mining activities in the border zone.

b. Supreme Decree No. 032 is not contrary to Peruvian law

292. Claimant contends that Supreme Decree No. 032 was contrary to Peruvian Law.[525] In particular, Bear Creek alleges that Supreme Decree No. 032 did not comply with the General Law on Administrative Proceedings, which specifies procedures for revoking administrative acts.[526] Bear Creek also claims that Supreme Decree No. 032 did not comply with Law No. 27117 on expropriation.[527] Finally, Bear Creek insists on discussing a first instance court decision that has no legal effect in Perú, to support its claim on the alleged illegality of Supreme Decree No. 032.[528] However, Respondent's experts in administrative and constitutional law, Dr. Eguiguren and Dr. Danos, both agree that Supreme Decree No. 032 was a proper exercise of Perú's discretionary powers (not an administrative act), and that it was issued in accordance with Peruvian law.[529]

293. Supreme Decree No. 032 is a proper exercise of Perú's sovereign rights and discretionary powers. Supreme Decree No. 032 repealed Bear Creek's declaration of public necessity (issued by Supreme Decree No. 083), which had authorized the company to acquire mining concessions in the border zone. As discussed above, Supreme Decree No. 032 was issued in response to the critical social crisis that the Department of Puno was experiencing at

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[525] *See* Claimant's Reply at paras. 143-146.

[526] *See* Claimant's Reply at para. 144.

[527] *See* Claimant's Reply at para. 145.

[528] *See* Claimant's Reply at para. 143.

[529] *See* Danos Expert Report at paras. 112-139 [Exhibit REX-006]; Eguiguren Second Report at paras. 64-68 [Exhibit REX-007].

the time, and to the discovery of Bear Creek's scheme to circumvent Article 71 of the Constitution by indirectly acquiring the mining concessions without the proper authorization. Both reasons justify Supreme Decree No. 032 as a reasonable and adequate measure, because the reasons that supported Bear Creek's declaration of public necessity had indeed ceased to exist.[530]

294. In Section B.1 above, Respondent explained that a declaration of public necessity is a discretionary act of the State, where the State balances the possible negative effects of a foreign presence in the border zone with the benefits it may bring to promote general welfare. Dr. Eguiguren and Dr. Danos both explain in their expert reports that, just as a declaration of public necessity is a discretionary act of the State, its repeal is also a discretionary act.[531] Thus, if the reasons that supported the issuance of a public declaration cease to exist, then the State may exercise its discretionary powers and revisit whether the presence of the foreigner in the border zone remains in the interest of the State and contributes to the general welfare of the population or instead poses risks to national security.[532] If the foreigner's presence in the border region contributed to serious internal social turmoil, for example, the Government could well conclude that the public necessity designation was no longer sustainable.[533]

295. This is what happened in Bear Creek's case. Bear Creek failed to work with all of the affected local communities to gain their trust and acceptance so that they would support the Project. In consequence, the Aymara population launched protests against mining in the South of the Puno Department, and in particular against the Santa Ana Project, which grew and endured,

[530] *See* Danos Expert Report at para. 117-118 [Exhibit REX-006]; Eguiguren Second Report at para. 67 [Exhibit REX-007].

[531] *See* Danos Expert Report at para. 136-139 [Exhibit REX-006]; Eguiguren Second Report at para. 19 [Exhibit REX-007].

[532] *See* Danos Expert Report at para. 136-139 [Exhibit REX-006]; Eguiguren Second Report at para. 65 [Exhibit REX-007].

[533] *See* Danos Expert Report at para. 122 [Exhibit REX-006]; Eguiguren Second Report at paras. 65-67 [Exhibit REX-007].

leading to an extreme social situation where Bear Creek's presence in the area became unsustainable. In addition to this, the Government became aware of the apparent constitutional violation of Article 71 by Bear Creek at the time it acquired the mining concessions. Thus, Bear Creek's declaration of public necessity was no longer sustainable and Perú properly exercised its discretionary powers when it repealed the declaration.[534]

296. Bear Creek contends that because a declaration of public necessity is an administrative act, as opposed to a discretionary act, its revocation must follow the specific rules set out in the General Law of Administrative Proceedings.[535] But that position depends on applying the wrong law. Dr. Danos, an administrative law expert, explains that the provisions of the General Law of Administrative Proceedings are only applicable to administrative acts.[536] Administrative acts are understood as acts of a public entity with a particular effect that are issued pursuant to a law.[537] A declaration of public necessity that authorizes a foreigner to own rights in the border zone is not an administrative act, as Respondent explained in Section B.1 above. It is a *sui generis* act of the State though which the highest Executive body of the State exercises its sovereign, discretionary powers to assess "public necessity," particularly in light of national security interests.[538] Thus, the General Law of Administrative Proceedings is not applicable to the repeal of a declaration of public necessity.[539] In other words, Perú did not have to follow the specific rules of procedure set out in that law for revoking an administrative act, because they are not applicable to the repeal of a declaration of public necessity. As explained

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[534] *See* Danos Expert Report at paras. 123-124 [Exhibit REX-006]; Eguiguren Second Report at paras. 65-67 [Exhibit REX-007].

[535] *See* Claimant's Reply at para. 144.

[536] *See* Danos Expert Report at para. 135 [Exhibit REX-006].

[537] *See* Danos Expert Report at para. 45 [Exhibit REX-006].

[538] *See* Danos Expert Report at para. 136 [Exhibit REX-006]; *see also* paras. 50-55 *supra.*

[539] *See* Danos Expert Report at para. 136 [Exhibit REX-006].

above, Supreme Decree No. 032 was a reasonable exercise of Perú's discretionary powers and is in accordance with Peruvian law.[540]

297. Even if Supreme Decree No. 032 were an administrative act (it is not), it would be reasonable under General Law of Administrative Proceedings. Dr. Danos explains that according to Peruvian administrative law, a revocation of an administrative act would be justified if the conditions that allowed the issuance of the act cease to exist. As already explained above, the circumstances that justified Bear Creek's declaration of public necessity ceased to exist when the government discovered Bear Creek's constitutional violation, in conjunction with the social crisis in the Department in Puno in 2011.[541]

298. Bear Creek also claims that Supreme Decree No. 032 is contrary to Peruvian law because it did not comply with Law No. 27117 on expropriation.[542] According to Claimant, Perú should have expropriated the Santa Ana Project by issuing a law, granting compensation, and either public necessity or national security should have justified the expropriatory measure.[543] Dr. Eguiguren explains in his witness statement that Bear Creek is also misguided in this argument. Under Law No. 27117, an expropriation occurs only when property has been taken.[544] As Dr. Eguiguren explains, Supreme Decree No. 032 did not take any property right from Bear Creek. Supreme Decree No. 032 repealed Supreme Decree No. 083, which did not grant any property right to Bear Creek. Rather, Supreme Decree No. 083 approved a declaration of public necessity that *authorized* Bear Creek to acquire the Santa Ana mining concessions; it did not

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[540] *See* Danos Expert Report at paras. 123-124 [Exhibit REX-006].

[541] *See* Danos Expert Report at paras. 123-124 [Exhibit REX-006].

[542] *See* Claimant's Reply at para. 145.

[543] *See* Claimant's Reply at para. 145.

[544] *See* Eguiguren Second Report at para. 77 [Exhibit REX-007].

grant Bear Creek title over the concessions.[545] And Supreme Decree No. 032 established that there was no longer such a public necessity; it did not revoke the concessions themselves. In fact, Bear Creek still holds the titles to the mining concessions to this day.[546] Thus, because Supreme Decree No. 032 did not expropriate any property right, under Peruvian law, it did not have to follow the requirements and procedures set out in Law No. 27117.[547]

299. Finally, Bear Creek contends that the first instance constitutional court decision on Supreme Decree No. 032 "constitutes persuasive evidence of Perú's wrongdoing."[548] It does not. This decision is at best an opinion from one judge from a lower court; it is not a decision from Perú's Superior Court of Justice or the Peruvian Constitutional Tribunal. The decision is not binding and is not *res judicata* under Peruvian law.[549] Claimant criticizes Perú for trying to minimize the import of the first instance constitutional court decision, but it fails to respond to Respondent's points.[550] Claimant contends only that Bear Creek "cannot be faulted for Perú's inability to test that decision on appeal."[551] But that is just the case: it is entirely because of Bear Creek's decision to pursue this arbitration that the first instance decision was never tested on appeal. In other words, it is entirely Bear Creek's choice that they did not obtain either confirmation or a rejection of the first instance court's decision on the alleged illegality of Supreme Decree No. 032. If Bear Creek was so confident that the first instance decision was

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[545] *See* Eguiguren Second Report at para. 78 [Exhibit REX-007].

[546] Resolution the Orders Initiation of Legal Actions to Annul Legal Acts, Ministerial Resolution No. 289-2011-MEM/DM, June 28, 2011[Exhibit R-028]; Claim filed by MINEM against Bear Creek and Ms. Villavicencio before the Civil Court in Lima, July 5, 2011[Exhibit C-0112].

[547] *See* Eguiguren Second Report at paras. 81-82 [Exhibit REX-007].

[548] Claimant's Reply at para. 143.

[549] *See* Eguiguren Second Report at paras. 69-72 [Exhibit REX-007]; Danos Expert Report at paras. 126-128 [Exhibit REX-006].

[550] *See* Claimant's Reply at para. 143.

[551] Claimant's Reply at para. 143.

correct, then it should have been content to pursue its action in Peruvian courts. There is no suggestion of any bias against Bear Creek there or any lack of independence of Peruvian judiciary. Instead, however, it chose to abandon that proceeding and bring its case before this Tribunal. Bear Creek had the option to rely on the favorable first instance decision, and to pursue that avenue to obtain a final decision from a higher court in Perú. It decided, however, to opt out of that avenue and bring the case before this Tribunal. Bear Creek ought not now be trumpeting a first instance judgment that has no legal effect, having chosen to abandon its resort to Perú's courts.

G. ALLEGED STATEMENTS BY PERUVIAN OFFICIALS TRYING TO FIND A SOLUTION TO THE COMPANY'S PROBLEM DO NOTHING TO PROVE BEAR CREEK'S CASE

300. In an effort to take a shortcut around its burdens of proof and persuasion and the high legal standards that apply to its claims, Bear Creek continues to try to manufacture admissions of liability from statements of Government officials who tried to help the company find solutions to its problems.[552] Bear Creek alleges that, after June 25, 2011, its representatives met 46 times with Peruvian public officials, including outgoing Prime Minister Fernández, outgoing Minister of Mines and Energy Pedro Sánchez, outgoing Vice-Minister of Mines Fernando Gala, and MINEM Legal Director César Zegarra, among others.[553] In these meetings, according to Bear Creek, the officials allegedly apologized for what happened to Bear Creek.[554] Bear Creek's allegations are unproven and implausible, and in any event, would do little to help its case. Even if Bear Creek's self-serving characterizations of these meetings were accurate, any such discussions only show that Perú's officials were interacting with the company in good

[552] *See* Claimant's Reply at paras. 147-151.

[553] *See* Claimant's Reply at para. 147.

[554] *See* Claimant's Reply at para. 147.

faith to try to address the concerns of both sides of the social conflict; they are not, and cannot be treated as, admissions of any liability under the Perú-Canada FTA.

301. Bear Creek alleges that Prime Minister Fernández told Bear Creek that she was surprised at how Supreme Decree No. 032 was enacted.[555] In her witness statement, Prime Minister Fernández testifies that, to the best of her recollection, she did not meet with any Bear Creek representatives after Supreme Decree No. 032 was enacted.[556] Moreover, she notes that it would have made no sense for her to say that she was surprised about how the Supreme Decree had been enacted, because she participated in the process herself.[557] Bear Creek offers nothing to substantiate Mr. Antunez de Mayolo's memory of the supposed conversation.

302. Bear Creek also alleges that in a meeting—on an unspecified date—with Minister Sánchez and Vice-Minister Gala, Minister Sánchez said that MINEM had no reason to believe that Bear Creek had acted improperly in the acquisition of the mining concessions.[558] Vice-Minister Gala does not even recall this meeting with Bear Creek after Supreme Decree No. 032.[559] He also states that it would have been odd for Minister Sánchez to have made that declaration, since he approved the issuance of Supreme Decree No. 032 and was aware of the disclosures about Bear Creek's circumvention of Article 71.[560] Again, Bear Creek relies solely on Ms. Antunez de Mayolo's witness statement with no documentary corroboration for this supposed admission.

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[555] *See* Claimant's Reply at para. 148.

[556] *See* Fernández Witness Statement at para. 31 [Exhibit RWS-004].

[557] *See* Fernández Witness Statement at para. 31 [Exhibit RWS-004].

[558] *See* Claimant's Reply at para. 148.

[559] *See* Gala First Witness Statement at para. 48 [Exhibit RWS-001].

[560] *See* Gala Second Witness Statement at para. 24 [Exhibit RWS-005].

303. Bear Creek also alleges that they met with Guillermo Shinno, the new Vice-Minister after the July 2011 change in government, and Dr. Zegarra on an unspecified date. At that meeting, according to Bear Creek, Mr. Shinno and Dr. Zegarra allegedly confirmed the legality of Bear Creek's scheme to acquire the concessions, and stated that the Supreme Decree No. 032 has no legal basis.[561] Dr. Zegarra states in his witness statement that he does not remember making any of those supposed declarations. He also states that he does not believe he would have made such statements because he was present at the time Supreme Decree No. 032 was discussed and enacted. According to him, if the officials involved had thought that Bear Creek had acquired the concessions in an appropriate manner, they would not have issued Supreme Decree No. 032.[562]

304. Perú is a country that respects the rule of law, welcomes investment, and treats investors well. All of these discussions, if they actually occurred, were carried out in good faith as part of listening to the company's concerns and potentially looking for mutually acceptable solutions to the company's problems. Any engagement in good faith discussions to try to find a resolution to Bear Creek's problems cannot be treated as admissions of liability under the FTA.

H. BEAR CREEK CANNOT SHOW THAT, BUT FOR SUPREME DECREE NO. 032, THE SANTA ANA PROJECT WOULD HAVE PROCEEDED TO THE EXTRACTION PHASE, MUCH LESS WOULD HAVE BEEN A SUCCESSFUL MINE

305. Claimant argues in this arbitration that Supreme Decree No. 032 deprived it of more than a decade of mining revenues from not just one, but two projects, Santa Ana and Corani. Yet, as Perú explained in its Counter-Memorial, each of these projects was, at best, years away from operating; neither had even been properly permitted or constructed.[563] In fact,

[561] *See* Claimant's Reply at para. 150.

[562] *See* Zegarra Second Witness Statement at para. 24 [Exhibit RWS-007].

[563] *See* Respondent's Counter-Memorial at Section G.

the Santa Ana Project—which Claimant claims would have to come into operation before Bear Creek would even begin to construct the Corani mine[564]—did not have approval of its EIA, did not have any rights to use the lands on which the mine would be located, and did not have myriad other permits that are required before it could construct and operate a mine in Huacullani.

306. In short, but as will be explored in some detail in sub-Section 1 below, there were many major steps remaining before Bear Creek could hope to earn any of the income that it claims as lost damages in this case, and any one of those steps could have seriously impaired, delayed or even led to the cancellation of the Project, even if Supreme Decree No. 032 had never been issued. Indeed, as discussed in sub-Section 2 below, the experiences of other stalled mining projects in Perú make clear that such debilitating obstacles can arise even if the company obtains key government approvals. As a result, the Tribunal cannot have any confidence that either of the company's projects would ever have come to fruition given the many serious hurdles that Bear Creek had yet to overcome, even if Bear Creek's authorization to own mineral rights in Perú's border zone had never been called into question.

307. In response, Claimant argues that none of the remaining steps would have been difficult because the Government had no discretion to deny the required permits or authorizations, so long as Bear Creek met the minimal legal requirements.[565] Claimant also alleges that it is an experienced mining company that knew how to put together the right information and successfully conduct negotiations with the local communities to ensure that Bear Creek would receive all necessary authorizations.[566] Neither of these arguments is correct.

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[564] Claimant's Reply at para. 250.

[565] *See* Claimant's Reply at para. 165; Flury Report at para. 92.

[566] *See* Claimant's Reply at para. 165; Flury Report at paras. 93, 113.

308. First, as Dr. Rodriguez-Mariátegui explains, the Government has discretion to grant or deny many of the remaining authorizations and permits. Although the Government must follow the law and cannot invent new requirements, several legal requirements for the EIA and other remaining permits are broad and leave substantial room for professional discretion of the Government's regulators.[567] The laws are designed to allow companies a level of predictability, while maintaining the discretion of the Government to protect its citizens and the environment. For example, the General Environmental Law requires that the EIA contain "a description of the proposed activity and the direct and indirect impacts expected from said activity in the physical and social environment in the short and long term, as well as a technical evaluation of the same."[568] The EIA must also include the "necessary measures to avoid or reduce the harms to a tolerable level."[569] It is easy to see that providing adequate information for requirements of this sort is not simply a matter of submitting the correct fact or document—the requirements implicate a level of professional discretion and judgment on the part of the DGAAM to review, for example, the adequacy of a company's EIA to determine if it does or does not meet the requirements of "necessary measures to avoid or reduce the harms to a tolerable level."[570] Given the prevalence of similar, broad requirements for the EIA and subsequent water, archaeological, and other permits,[571] Dr. Rodriguez-Mariátegui was clear that "one cannot argue that there is no margin for subjectivity and professional analysis" for the permits and authorizations that Claimant lacked.[572] The consequence is that Claimant cannot claim that it was certain to receive

[567] Rodríguez-Mariátegui Second Report at para. 62 [Exhibit REX-009].

[568] Rodríguez-Mariátegui Second Report at para. 63 [Exhibit REX-009].

[569] Rodríguez-Mariátegui Second Report at para. 63 [Exhibit REX-009].

[570] Rodríguez-Mariátegui Second Report at paras. 62-63 [Exhibit REX-009].

[571] Rodríguez-Mariátegui Second Report at para. 64 [Exhibit REX-009].

[572] Rodríguez-Mariátegui Second Report at para. 62 [Exhibit REX-009].

all of those permits and authorizations—and a lack of any one of them would stop the Project in its tracks.

309. Second, as discussed in greater detail above in Section A, Claimant is a junior mining company with no experience constructing or operating mines.[573] The fact that Claimant has never constructed or operated a mine is not in dispute. Mining *discoveries*—rather than operations—constitute the major successes of Claimant's principles, by their own admission.[574] Claimant therefore asks this Tribunal to assume that Claimant could transition seamlessly from its status as a junior mining company—one "engaged in the acquisition and exploration of mineral properties" only[575]—to success as a full-fledged senior mining company that constructs and actually operates mines. This assumption is implausible at best and, in fact, Claimant's actions developing the Santa Ana Project, as described in the sections that follow, cast considerable doubt on that likelihood.

310. The Tribunal must therefore scrutinize heavily Claimant's speculation that it would have received the requisite permits and authorizations—on Claimant's precise time schedule *and* in the midst of a massive social uprising targeting Claimant's Project in particular that paralyzed cities, blocked commerce between Bolivia and Perú, and resulted in the deaths of Peruvian citizens. Despite the confidence that Claimant and its backers have in themselves, the facts show that Bear Creek had already shown that navigating the regulatory and social pathways to project construction and operation was a massive undertaking for which it was not prepared.

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[573] *See, e.g.*, McLeod-Seltzer Witness Statement at para. 18 (admitting that, if it built Santa Ana, then Claimant would "*[b]ecom[e]* a producer [of minerals]" because it currently is not one); Bear Creek Annual Information Form, April 3, 2014, at p. 9 (Bear Creek "has received no revenue to date from the exploration activities on its properties.") [Exhibit R-237].

[574] *See, e.g.* McLeod-Seltzer Witness Statement at paras. 5 (describing the $800 million sale of Arequipa Resources Ltd.), 7 (describing the $791 million sale of Peru Copper Inc.)

[575] Bear Creek Annual Information Form, April 3, 2014, at p. 6 [Exhibit R-237].

1. Bear Creek Had to Overcome Many More Legal Hurdles Before It Could Ever Have Constructed a Mine or Exploited Silver at Santa Ana

311. When Perú enacted Supreme Decree No. 032, Claimant was in the middle of the environmental evaluation stage for the exploitation of resources at Santa Ana. As discussed above, Claimant had already conducted exploration of the concessions and discovered what it believed to be a viable silver deposit. Claimant needed an approved EIA before it could proceed with seeking other permits that would in turn allow Claimant to construct and eventually operate a mine at Santa Ana. Just as critically, however, Claimant needed to negotiate with the local Aymara communities to obtain the right to construct and operate the mine on property that belonged to the *comunidades campesinas*. Given the rampant, and at the time still growing, opposition to mining generally and to Bear Creek's Santa Ana Project specifically, obtaining these land use rights for an open-pit mine would have constituted a significant barrier. Despite Claimant's effusive confidence that all of these challenges would certainly be met,[576] the following sections outline a number of key stumbling blocks, any one of which could have derailed, or at the very least significantly delayed, the Santa Ana Project.

a. Bear Creek had not obtained approval of the Environmental Impact Assessment

312. When Perú issued Supreme Decree No. 032, Claimant was in the process of seeking approval of its EIA. Claimant filed its EIA in December 2010. In January 2011, the DGAAM approved[577] the EIA's Executive Summary—a high level overview of the EIA as a whole[578]—and the company's Citizen Participation Plan ("PPC")—a broad outline of the

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[576] Claimant's Reply at para. 165.

[577] Report No. 013-2011-MEM-AAM/WAL/AD/KVS, January 7, 2011 [Exhibit C-0161].

[578] Ministerial Resolution No. 304-2008-MEM-DM, at Art. 16 [Exhibit R-153] (Art. 16: "The Executive Summary is a synthesis of the relevant aspects of the EIA . . . that shall be reduced into plain language with the goal of

company's planned social outreach.[579] In April 2011, the DGAAM raised 157 observations to the EIA[580] and the Ministry of Agriculture raised 39 observations.[581] These "observations" identify items that need further explanation, evidence, or supporting information; items that are missing entirely; or items that are incomplete—in other words, they represent the regulators' objections to the sufficiency of the EIA as it was initially submitted. The local communities in Puno, through the FDRN, submitted two observations as well.[582] Bear Creek needed to resolve all of these observations in a manner satisfactory to the DGAAM before the DGAAM would approve the EIA.[583]

313. Before Bear Creek filed responses to the 196 observations, the DGAAM suspended the EIA review process, as discussed above, in direct response to the disorder in the Puno Region in reaction to the Santa Ana Project.[584] The DGAAM therefore never had the opportunity to review Claimant's responses to the EIA observations, nor to determine whether those responses did or did not sufficiently alleviate the regulators' concerns.[585] Nevertheless, Claimant makes a number of arguments in an effort to convince the Tribunal that approval of the

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providing a clear idea of the mining project, of its potential impacts positive and negative, and the methods of prevention, control, mitigation, and others that could be relevant.").

[579] Ministerial Resolution No. 304-2008-MEM-DM, Art. 15 [Exhibit R-153] (Art. 15: "The Citizen Participation Plan is the document through which the concession owner proposes to the competent authority the mechanisms of participation that it will use during the evaluation of the EIA . . . and during the execution of the mining project.").

[580] DGAAM's Observations to Bear Creek's EIA for Exploitation, April 19, 2011 [Exhibit R-040].

[581] Ministry of Agriculture, Observations to the Environmental Impact Study, Technical Opinion No. 016-11-AG-DVM-DGAA-DGA, January 2011 [Exhibit R-041].

[582] *See* Bear Creek's Response to Defense Committee's Observations to the Environmental Impact Study of the Santa Ana Project, July 2011 [Exhibit R-177].

[583] *See* Ramírez First Witness Statement at para. 25 [Exhibit RWS-002].

[584] *See* DGAAM Resolution 162-2011-MEM-AAM, May 30, 2011 [Exhibit C-0098].

[585] Ramírez Second Witness Statement at para. 32 [Exhibit RWS-006].

EIA was a foregone conclusion,[586] but none of which are sufficient to prove that the EIA would have been approved.

314. Claimant opines that "Perú provides no credible argument that MINEM would not have approved Bear Creek's ESIA."[587] But, it is *Claimant* that must prove that a treaty violation committed by Perú caused the damages that Claimant claims in this arbitration. The burden is therefore on Claimant, and not Respondent, to prove that the EIA *would have* been approved. Indeed, Claimant must prove that, and then also prove that all other permits would have been granted, that land use agreements and social license more generally would have been obtained from the affected communities, that the mine would have been constructed and operated within Claimant's assumptions, and that the only thing that stood in the way of all of those outcomes was Perú's alleged breach of the FTA via Supreme Decree No. 032. It is not sufficient for Claimant to simply state that Perú cannot prove that a given approval or event *would not have* occurred; instead, Claimant must prove that it *would have*.

315. Focusing in this Section on the EIA approval, *first*, Claimant argues that because the DGAAM approved the Executive Summary of the EIA, the full EIA must have been substantially adequate and could not have been "flawed or incomplete."[588] This makes no sense. The fact that a high-level summary was deemed adequate has no bearing on whether or not the full environmental assessment was sufficient. As Mr. Ramirez explains, the regulations governing the adequacy of the Executive Summary are very general, and the DGAAM will only reject an Executive Summary with extreme flaws.[589] Dr. Rodríguez-Mariátegui notes that the

[586] *See* Claimant's Reply at paras. 154-64.

[587] Claimant's Reply at para. 164.

[588] Claimant's Reply at para. 155. *See also* Antunez de Mayolo Second Witness Statement at para. 21 ("I cannot overemphasize the fact that the DGAAM's approval of [the Executive Summary] constituted a critical step").

[589] Ramírez Second Witness Statement at para. 32 [Exhibit RWS-006].

review of the Executive Summary is little more than an "initial evaluation," as the approval document itself make clear.[590] Moreover, the maximum time period that the DGAAM may take to review the Executive Summary is 7 business days, which is sufficient to review a 67-page Executive Summary, but clearly would be an insufficient period of time to substantively review a nearly 3,000-page full EIA.[591] DGAAM approval of the Executive Summary means nothing more than that the Executive Summary complies with the general requirements under the law, and that the DGAAM is prepared to proceed to review the EIA. Approval of the Executive Summary is not a signal that the EIA itself will be approved, and Claimant's effort to link the two processes is highly misleading.

316. *Second*, Claimant's mining law expert Dr. Flury claims that he reviewed the regulators' observations and Bear Creek's proposed responses to them in full,[592] and he claims that all of Bear Creek's responses were sufficient to resolve the regulators' concerns.[593] Dr. Flury's opinion on the matter is not probative. Dr. Flury has spent his career on the private sector side of the mining industry—including serving together with Bear Creek's executives on the boards of other mining companies[594]—except for a brief, less than one-year term as the

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[590] *See* Rodríguez-Mariátegui Second Report at paras. 75-76 [Exhibit REX-009]; *See also* Ministerial Resolution No. 304-2008-MEM-DM [Exhibit R-153]; Report No. 013-2011-MEM-AAM/WAL/AD/KVS, January 7, 2011 [Exhibit C-0161].

[591] *See* Rodríguez-Mariátegui Second Report at para. 76 [Exhibit REX-009]; Ramírez Second Witness Statement at para. 12 [Exhibit RWS-006].

[592] Claimant explains that despite the suspension of the EIA, Bear Creek submitted its responses to the 196 observations to a notary before the 60 business day deadline had expired. Claimant's Reply at para. 159. This is irrelevant for purposes of determining whether Bear Creek resolved the observations; Bear Creek's submission has never been reviewed officially, and has never been approved.

[593] Flury Report at para. 87; Claimant's Reply at para. 159.

[594] As recently as 2011, Flury, Swarthout, and Bear Creek's CFO Kevin Krause all sat together on the Board of Directors for a small Peruvian mining company called Rio Cristal. Rio Cristal Corporate Document, August 16, 2011 [Exhibit R-309], Rio Cristal Corporate Presentation, May 2010 [Exhibit R-310]. In 1999, Flury, Swarthout, and current Bear Creek Director Kevin Morano all served as executives for SPCC. Southern Peru Copper Corp. Form 10-K 405, *available at* http://www.secinfo.com/d7Fe.6a htm) [Exhibit R-311].

Minister of Energy and Mines.[595] Unlike Mr. Ramirez, the former Director of the DGAAM, Mr. Flury has never worked in the DGAAM, and has never reviewed an EIA for sufficiency from the perspective of that regulatory, technical body. The Director of the DGAAM, and not the Minister of Energy and Mines, signs the resolution that orders the company to resolve observations and the resolution that approves the EIA if the company resolves those observations satisfactorily.[596] His opinion is therefore no more valid than any other industry representative with experience pursuing the EIA process—such as Dr. Rodriguez-Mariategui, who reviewed the same materials and came to very different conclusions about Bear Creek's prospects for resolving the regulators' observations.[597] Accounting for good-faith professional disagreement, Dr. Flury cannot possibly prove definitively that the EIA *would* have been approved by DGAAM following a review of Bear Creek's responses to the observations.

317. *Third*, Claimant alleges that Vice-Minister Gala and advisor to the Minister Clara García "acknowledged that there were no problems with Bear Creek's ESIA."[598] Claimant has taken out of context media reports purporting to describe statements of Vice-Minister Gala and Ms. García. First, neither Vice-Minister Gala nor Ms. Garcia reviewed Bear Creek's EIA; that was not their role at MINEM. Therefore, they would not have had any knowledge about the legal or technical sufficiency of the EIA. The DGAAM, on the other hand, was the MINEM Directorate tasked with conducting a thorough review of the EIA, and it identified 157

[595] *See* Flury Report at paras. 1-7. Claimant accurately, but misleadingly, refers to Dr. Flury throughout its Reply Submission as the "former Minister of Energy and Mines," despite the fact that almost all of Dr. Flury's experience is in the private sector.

[596] *See* DGAAM Observations [Exhibit R-040]; Directorial Resolution Approving the EIA for Tia Maria, Directorial Resolution No. 392-2014-MEM/DGAAM, August 1, 2014 [Exhibit R-332].

[597] *See* Rodriguez-Mariátegui First Report at para. 46 [Exhibit REX-003]; Rodriguez-Mariátegui Second Report at paras. 80-102 (recounting several deficient responses and concluding that "diverse aspects of the Santa Ana Project EIA maintain some observations that have not been satisfactorily resolved . . . .") [Exhibit REX-009].

[598] Claimant's Reply at para. 156.

observations that would have to be resolved adequately before the EIA could possibly be approved. Second, Vice-Minister Gala explained this press report in his first witness statement, saying that he was aware at that time of these media reports (May 2011) that Bear Creek had filed an EIA, but also that the EIA was still subject to review and had not been approved.[599] In a separate contemporaneous statement posted on MINEM's official website, Vice-Minister Gala explained that Bear Creek had presented an EIA that was under review at the DGAAM, which had made observations as to the sufficiency of the report.[600] Vice-Minister Gala continued: "their project is not approved just because they submit an EIA and hold a public hearing, that is not so; moreover, granting a concession does not automatically mean an authorization to operate, whoever says so is lying."[601] At most, Vice-Minister Gala and Ms. Garcia confirmed that Bear Creek had submitted an EIA, as it was required to do by law before it could proceed with the Santa Ana Project. Obviously, Claimant cannot use press articles allegedly reporting comments made by two MINEM officials to claim that the DGAAM's detailed review did not identify any deficiencies or to claim that the EIA was certain to be approved.

318. *Fourth*, Claimant states that Bear Creek's engineers met with DGAAM and MINAG employees, that its responses to the EIA were "truly a collaborative effort", and that those discussions left "no doubt that MINEM and MINAG would have accepted Bear Creek's responses to their observations."[602] The fact that such consultations took place—assuming *arguendo* that they did, despite Bear Creek's failure to introduce any contemporaneous evidence of them—could not be evidence that the responses to the observations were adequate. It is not

[599] Gala First Witness Statement at para. 46 [Exhibit RWS-001].

[600] MINEM, "Santa Ana Project May Not Do Any Mining Activities Because it Does Not Have the Environmental Permit", May 6, 2011 [Exhibit R-019]; Gala First Witness Statement at paras. 45-46 [Exhibit RWS-001].

[601] MINEM, "Santa Ana Project May Not Do Any Mining Activities Because it Does Not Have the Environmental Permit", May 6, 2011 [Exhibit R-019]; Gala First Witness Statement at para. 45 [Exhibit RWS-001].

[602] Antunez de Mayolo Second Witness Statement at para. 36. *See also* Claimant's Reply at para. 159.

uncommon for a company to meet with the Ministries in an attempt to formulate better responses. But this in no way guarantees that the responses will be adequate, and DGAAM employees have no authority to provide informal assurances that any such responses will be deemed sufficient.[603] In fact, Mr. Ramirez explains that oftentimes the company will use these meetings as an opportunity to complain to the DGAAM about certain observations and to try to convince the DGAAM to withdraw them, which is not possible.[604] Any Bear Creek meetings with working level employees would do nothing to show that the EIA would have been approved.

319. *Fifth* and finally, Claimant argues that the large number of observations—196—does not mean that the EIA was substantially incomplete.[605] According to Dr. Flury, "there is *no relationship* between the number of observations and the socio-environmental sensitivity of a mining project" because communities or stakeholders sometimes repeat observations in order to make the number seem high.[606] That dynamic is not relevant for Claimant's EIA because the 196 observations in question were issued by the DGAAM and the MINAG, not by third party groups seeking to increase the perception of opposition to the Project.[607] The number of observations for the Santa Ana Project (196) also doubles the number of observations for Claimant's Corani Project (94),[608] even though Claimant has explained that the Corani Project is

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[603] Ramírez Second Witness Statement at para. 37 [Exhibit RWS-006].

[604] Ramírez Second Witness Statement at para. 37 [Exhibit RWS-006].

[605] Claimant's Reply at para. 159.

[606] Flury Report at para. 84 (emphasis added).

[607] As noted above, the FDRN did submit two additional observations as well, but Respondent's points about the observations have purposefully focused on the *regulators'* 196 observations as being more indicative of substantive insufficiencies in the EIA. Of course, Bear Creek would also have had to answer the community observations, both for purposes of the EIA review and as part of its efforts to obtain the social license more generally.

[608] Ministry of Energy and Mines Resolution No. 355-2013-MEM/AAM, September 20, 2013 [Exhibit C-0146].

a significantly larger and more complicated prospective silver project.[609] Dr. Flury compiled a chart of several other projects that also garnered a large number of observations.[610] But Dr. Flury's chart is not necessarily helpful to his cause. Notably, except for the Toromocho Project, for every one of the projects listed in the chart, the EIA actually earned fewer observations than the Santa Ana Project's EIA. Also of note, Minera Chinalco, the proprietor of the Toromocho Project, took several rounds of responses to resolve all of the observations in a process that lasted more than a year.[611] The EIAs for various other projects on the chart took as long, or even longer, to receive approval: The Expansión de la Unidad de Producción Cerro Verde Project took 13 months,[612] and the La Zanja Project took 15 months.[613]

320. Moreover, as Dr. Rodriguez-Mariátegui explains, the concern is not only with the number of the observations, but their content.[614] Dr. Rodríguez-Mariátegui and Mr. Ramirez reviewed the observations to the EIA and Claimant's responses to the observations, and they have several doubts as to the sufficiency of those responses. Dr. Rodríguez-Mariátegui also discussed several observations in his first report that Claimant failed to address.[615] A few of the observations that Claimant failed to resolve are discussed below.

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[609] Claimant's Reply at para. 178.

[610] Flury Report at para. 85.

[611] Directorial Resolution No. 411-2010-MEM/AAM, December 14, 2010, at pp. 1-5 (describing the procedural history of the EIA wherein Chinalco submitted its EIA in November 2009, the DGAAM issued its observations in April 2010, and the observations were eventually resolved in December 2010, but only after Chinalco failed to resolve the observations presented by the DGAAM and other entities in several initial attempts) [Exhibit Flury-035].

[612] Directorial Resolution No. 403-2012-MEM/AAM, December 3, 2012 [Exhibit Flury-038].

[613] Directorial Resolution No. 090-2009-MEM/AAM, April 24, 2009 [Exhibit Flury-033].

[614] Rodríguez-Mariátegui Second Report at paras. 77-78 [Exhibit REX-009].

[615] Rodríguez-Mariátegui Second Report at para. 81 [Exhibit REX-009]. *See also* Ramírez Second Witness Statement at paras. 34-36 (discussing deficiencies in several of Bear Creek's responses to the observations) [Exhibit RWS-006].

321. *DGAAM Observation No. 155*: This observation called for Bear Creek to present evidence that it was conducting the "guided visits" that it had promised to conduct in its December 2010 PPC.[616] Guided visits are one mechanism that the company may employ in an effort to build a community consensus in support of the project, wherein it organizes visits to the project site with local community leaders, groups, and other interested parties to help educate them about the scope of the project and the potential effects that the project will have. This citizen participation mechanism allows for the company to demonstrate to the communities that it is complying with environmental standards and helps to build trust with the communities. Mr. Ramirez noted that conducting the guided visits mentioned in observation no. 155—and therefore resolving the observation—would have been very difficult because of the ongoing violent protests in Puno.[617] Claimant, on the other hand, argues that it sufficiently resolved this observation because the observation did not call for *additional* guided visits, but rather, the observation called for proof that guided visits had already taken place.[618] This is not true.

322. In its PPC, Bear Creek promised to conduct guided visits throughout the DGAAM's evaluation of the EIA and also throughout the life of the Project.[619] Observation no. 155 therefore requested that Bear Creek provide evidence of the guided visits "during the evaluation of the EIA."[620] Because the evaluation of the EIA was ongoing, Bear Creek would be required to conduct additional guided visits and provide additional evidence that those guided

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[616] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 233 (Bear Creek "should accredit the implementation of the citizen participation mechanism during the evaluation of the EIA called Guided Visits.") [Exhibit R-184].

[617] *See* Ramírez First Witness Statement at para. 27 [Exhibit RWS-002].

[618] Respondent's Reply at para. 160.

[619] *See* Bear Creek Citizen Participation Plan at Sec. 3.3 (Guided visits "will continue to be held during the evaluation of the Project."), Sec. 5.2 (Bear Creek "will continue [conducting guided visits] during the period of evaluation of the EIA. (2010-2011).") [Exhibit C-0155].

[620] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 233 [Exhibit R-184].

visits took place. In fact, Bear Creek's response to observation no. 155 suggests that it understood at the time—contrary to the position it takes now in this arbitration—that more guided visits were yet to take place. Rather than provide evidence that it had already conducted the guided visits, or state dates on which such guided visits had already taken place or the community groups that participated, Bear Creek simply stated that the information "will be presented in an additional document."[621]

323. In its Reply, Claimant asserted that it is "not correct" that Bear Creek had to organize additional visits, but still provided no evidence that the requisite guided visits had already taken place, and did not offer up the promised "additional document" that was going to prove that the guided visits occurred.[622] In fact, Claimant's assertion that the guided visits were complete is directly contradicted by its own PPC, as seen in the table below, which shows that Claimant intended to conduct guided visits at least from May 2011 *through December 2011*:

[621] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 233[Exhibit R-184].

[622] Claimant's Reply at para. 160.

Tabla 5.1
Cronograma de Ejecución de los Mecanismos de Participación Ciudadana durante la Evaluación del Estudio Ambiental – Año 2011

	Enero	Febrero	Marzo	Abril	Mayo	Junio	Julio	Agosto	Septiembre	Octubre	Noviembre	Diciembre
Oficina de Información permanente												
Visitas Guiadas												
Difusión de Material Informativo	Boletín	Revista	Boletín	Revista	Boletín	Revista	Boletín	Revista	Boletín	Revista	Boletín	Revista
Acceso al Resumen Ejecutivo y contenido del Estudio Ambiental												
Publicidad de Avisos de Participación Ciudadana en medios escritos y radiales												
Audiencia Pública												Folio Nº ... Letras ...

Source: Citizen Participation Plan at p. 11 [Exhibit R-227].

324. Clearly, Claimant had additional guided visits yet to conduct, which would have been difficult, if not impossible to do given the ongoing protests in Puno. In fact, Claimant acknowledged contemporaneously that the social situation in Puno made it difficult for Bear Creek even to access the Santa Ana Project site. According to OEFA, the organization tasked with monitoring compliance with environmental norms, Claimant told OEFA in November 2011 that "given the current social upheaval it was preferable that the company not accompany [OEFA] in the supervision of the site in the project zone."[623] Claimant evidently believed that it was "preferable" not to participate in the environmental monitoring, which would require company personnel to travel to the Santa Ana site, because it was not safe for them to do so. It is difficult to conceive, then, how Claimant could have conducted visits of the site with local community groups, if it was unwilling to send employees to the site at all. In any event, Bear

[623] OEFA, Act of Environmental Supervision, November 25, 2011 ("Bear Creek Mining Company Sucursal del Peru officials told us that due to the current social situation it was preferable that the company did not accompany us on field supervision in the project area.") [Exhibit C-0179].

Creek did nothing to resolve the observation; it simply informed the DGAAM that it would provide the information later, which is not sufficient to resolve the DGAAM observation.

325. *DGAAM Observation No. 78*: This observation asked Bear Creek to explain, at a "feasibility level,"[624] why it had dug only 13 test pits to study the soil of the surface land of almost 4,000 hectares.[625] Bear Creek responded that it had focused its testing on the areas close to project installations, and also that, when it was conducting the initial exploration, it was acting under a less stringent regulation.[626] This is not a sufficient response. As Dr. Rodríguez-Mariátegui points out, only 9 of the 13 test pits were located near project installations and, more importantly, the DGAAM was not invoking the new regulation in its observation; it was only requesting a valid justification for the low number of test pits.[627] Had the DGAAM been referencing the new regulation, it would have required a study of the area in far greater detail (what is known as "execution-level" detail), but it only requested Bear Creek to respond at a lesser, "feasibility" level of detail. Bear Creek failed to do even that.[628]

326. *DGAAM Observations Nos. 34 and 21*: Similarly, DGAAM observation No. 34 also requested a new feasibility-level study of the stability of the ground around the project, given the possibility of seismic activity in the area.[629] Bear Creek failed to provide the requested

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[624] Rodríguez-Mariátegui Second Report at para. 83, fn. 119 [Exhibit REX-009]. ("Although there is no legal definition for what is understood by a feasibility study, there are several parameters in other mining norms that indicate that the level of detail is elevated, to an intermediate level, between a pre-feasibility study and detailed engineering.").

[625] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 144 [Exhibit R-184].

[626] *See* Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 144 [Exhibit R-184].

[627] Rodríguez-Mariátegui Second Report at para. 84 [Exhibit REX-009].

[628] Rodríguez-Mariátegui Second Report at para. 84 [Exhibit REX-009].

[629] *See* Rodríguez-Mariátegui Second Report at para. 83 [Exhibit REX-009]; Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at pp. 84-85 [Exhibit R-184].

study, leaving this observation unresolved as well.[630] For DGAAM observation No. 21, Bear Creek failed to provide the additional information about the hydrodynamics and hydrogeology of the area that the DGAAM requested.[631] Bear Creek indicated instead that the additional studies were pending.[632]

327. *DGAAM Observations Nos. 23, 24, 90, 99, 111, and 141*: DGAAM and MINAG made numerous observations related to water issues at the Project site.[633] Claimant argues that none of the water-related observations would have proven problematic to resolve because the National Water Authority (*Autoridad Nacional del Agua*, or ANA) issued a technical report in support of the Project.[634] Claimant's argument misunderstands the different roles of the ANA and the DGAAM. The ANA reviews a project for issues related to water usage and the disposition of water sources.[635] The DGAAM, on the other hand, reviews the EIA for a wide variety of technical, environmental issues, including those related to potential water contamination. It is therefore inappropriate and wrong for Claimant to claim that the water-related observations[636] were insubstantial or somehow resolved by ANA's report. They had to be resolved, just like all of the other observations issued by the DGAAM.

[630] *See* Rodríguez-Mariátegui Second Report at para. 95 [Exhibit REX-009].

[631] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at pp. 55-56 [Exhibit R-184].

[632] Rodríguez-Mariátegui Second Report at para. 95 [Exhibit REX-009].

[633] *See* Rodríguez-Mariátegui First Expert Report at para. 46 [Exhibit REX-003]; Rodríguez-Mariátegui Second Expert Report at paras. 88 *et. seq.* [Exhibit REX-009].

[634] Claimant's Reply at para. 163.

[635] Rodríguez-Mariátegui Second Report at paras. 89-91 [Exhibit REX-009].

[636] Dr. Rodríguez-Mariátegui commented in his first report on DGAAM observations Nos. 23, 24, 90, 99, 111, and 141. *See* Rodríguez-Mariátegui First Report at para. 46 [Exhibit REX-003].

328. *Possible Interventions*: It should also be noted that, even once the DGAAM approves the EIA, third party groups can appeal the approval.[637] As one example, in May 2010, the Consejo de Minería decided an appeal of an approved EIA from a *comunidad campesina* by revoking the EIA approval.[638] It is notable that Vector, S.A., the same company that prepared the EIA for Bear Creek, prepared the EIA in that case that was approved and then ultimately overturned.[639] Therefore, even assuming that Claimant managed to resolve all of the DGAAM, MINAG, and other observations within the time limits provided, that EIA approval would not be definitive. It could still be challenged and delayed by third parties—and given the level of opposition in the local communities affected by the Santa Ana Project, it is not unreasonable to think that any DGAAM decision approving the EIA would very likely have been challenged by local community groups.

329. In sum, given the nearly 200 observations that Claimant needed to resolve, and the numerous problems that Respondent's witness and expert have identified with Claimant's first attempt to resolve them,[640] the Tribunal cannot possibly be confident or assume that the DGAAM would have approved Bear Creek's EIA, but for the May 2011 EIA review suspension and Supreme Decree No. 032. It is clear that Claimant had much work yet to do before the DGAAM might have approved the EIA, which also means that all of the remaining steps discussed next would also be at least delayed, if they were ever accomplished at all.

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[637] Rodríguez-Mariátegui Second Report at para. 101 [Exhibit REX-009].

[638] Rodríguez-Mariátegui Second Report at para. 101 [Exhibit REX-009]; Report on EIA Revocation for Compañia Minera Ancash Cobre S.A. Report No. 491-2010-MEM/AAM/FAC, May 20, 2010 [Exhibit R-288].

[639] Report on EIA Revocation for Compañia Minera Ancash Cobre S.A. Report No. 491-2010-MEM/AAM/FAC, May 20, 2010 [Exhibit R-288].

[640] *See* Rodríguez-Mariátegui Second Report at paras. 80-102 [Exhibit REX-009]; Ramírez Second Witness Statement at paras. 33-36 [RWS R-006].

b. Bear Creek had not acquired the right to use the lands on which the Santa Ana Project was to be built

330. Acquiring land use rights for a mining site is an obviously crucial requirement for any mining project. Peruvian mining concessions grant certain limited rights *only* with respect to the ores and minerals found beneath the surface. The landowners still own the surface rights of the land. Therefore, in order to construct and operate a mine on a given site, the company must either acquire the lands or at least obtain permission to enter into, disturb, and operate on those lands. Without the necessary permission to use the land, there can be no mining project. In fact, proof of ownership of the lands or at least a right to use them is required before a company can proceed even to request many of the permits that Claimant had not yet achieved.[641] In the case of Santa Ana, Claimant's EIA shows that the surface lands for the mine site were owned by the *comunidades campesinas* of Challacollo, Ancomarca, and Concepción de Ingenio, and that some lands were owned by the Parcialidad Condor de Ancocahua.[642] Thus, Claimant needed to negotiate with each of these four communities for either the acquisition of, or permission to use, the land.

331. By its own admission, Claimant had not procured all of the necessary land use rights for the Santa Ana Project. At most, it had come to terms with one community and it was still in the process of negotiating with the remaining three.[643] Claimant contends that one of the communities (Concepción de Ingenio) had voted to enter into an agreement with Bear Creek (although Claimant does *not* claim, and has not put on the record, a finalized agreement), and

[641] Rodríguez-Mariátegui Second Report at para. 109 [Exhibit REX-009].

[642] Rodríguez-Mariátegui Second Report at para. 111 [Exhibit REX-009]; EIA, Chapter 2: Description of the Project Area, Sec. 2.4.4.6 [Exhibit R-196].

[643] Strangely, Claimant states that it "is not true" that the landowners had not yet granted Claimant permission to build and operate the mine, but then admits that it was "negotiating agreements" with three communities. Claimant's Reply at para. 169. If Claimant was still negotiating the necessary agreements that it did not yet have the necessary permissions, as Peru correctly stated. It is entirely unclear why Claimant characterized this statement as "not true."

claims that it was confident that the remaining communities would soon follow.[644] Claimant's witness Mr. Antunez de Mayolo offers the prediction that, once one community contracts to sell its lands to a company, the other communities typically follow quickly.[645] Dr. Rodríguez-Mariátegui disagrees. Based on his approximately 30 years of experience in the Peruvian mining sector, Dr. Rodríguez-Mariátegui says it is more likely that the remaining communities will instead hold out and delay, in order to extract as many concessions as possible from the company. The communities in that circumstance hold significant leverage over the company, which they know cannot proceed with the mine until it negotiates with all of the communities.[646] This makes logical sense. The company in these situations is on a strict timeline and must appease shareholders and financial supporters. The communities, on the other hand, are only seeking to get the most from the company as possible; the price paid by the company is only going to increase. Mr. Antunez de Mayolo fails to explain what "incentives" the communities would possibly have to negotiate quickly, calling into question whether such incentives exist at all. Dr. Rodríguez-Mariátegui further explains that the decision-making process within communities is usually very drawn-out and slow.[647] Dr. Rodriguez-Mariátegui also explains that it is not uncommon for the first finalized land use agreements with the communities to cause conflicts among the other communities, given local rivalries.[648]

332. Moreover, although Claimant implies that it had completed an agreement with the

[644] *See* Claimant's Reply at para. 169; Antunez de Mayolo Second Witness Statement at para. 87.

[645] Antunez de Mayolo Second Witness Statement at para. 87.

[646] Rodríguez-Mariátegui Second Report at para. 120 [Exhibit REX-009].

[647] *See* Rodríguez-Mariátegui Second Report at para. 121 [Exhibit REX-009].

[648] Rodríguez-Mariátegui Second Report at para. 120 [Exhibit REX-009].

Concepción de Ingenio community,[649] it has not provided evidence of a final agreement.[650] In Perú, land use agreements with local indigenous communities are a sensitive legal field, given the importance that the communities place on the land and the historic marginalization of these communities, with a number of technical requirements contained in the *Ley de Tierras* (the Law of Lands).[651] These include, *inter alia*, a vote of two-thirds of the community members; verification that the communal authorities that sign the agreement are registered with SUNARP; and registration of the land use agreements.[652]

333. The April 2011 community *Acta*, or agreement by the members of the community, does not represent a final contract that is binding on Claimant and the community.[653] Moreover, even as a community *Acta*, the document has several deficiencies. For example, the *Acta* states that 76 community members participated in the vote, but does not list the total population of the community.[654] Nor does the *Acta* describe how many votes were in favor of the agreement and how many were against. Only 57 participants signed the *Acta*, but the voting results are not explained.[655] These deficiencies are crucial because, as explained earlier, a community agreement to allow a third party to use its lands must be approved by two-thirds of the community. It is not clear from the *Acta* that this requirement was met. Several other key, technical requirements are not evident on the face of the *Acta*, calling into question its validity:

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[649] *See* Minute of the Extraordinary General Assembly of the Farming Community of Concepción de Ingenio, April 2, 2011 [Exhibit C-0186].

[650] *See* Claimant's Reply at para. 169.

[651] *See* Rodríguez-Mariátegui Second Report at para. 118 [Exhibit REX-009]; Law on the Private Investment in the Development of Economic Activities Within the National Territory and Lands of the Native Communities, Law No. 26505, July 14, 1995 [Exhibit R-157].

[652] Rodríguez-Mariátegui Second Report at para. 118 [Exhibit REX-009].

[653] Rodríguez-Mariátegui Second Report at para. 113 [Exhibit REX-009].

[654] Peña Second Report at para. 65-66 [Exhibit REX-008].

[655] Peña Second Report at para. 66 [Exhibit REX-008].

(1) the details of how the meeting to approve the agreement was convened should be clearly stated;[656] (2) the document should specify whether the agreement was made available in the Aymara language to the voting participants, and that the attendees had the opportunity to participate in Aymara;[657] (3) the *Acta* should specify the "social support" that the company promises to provide to the community in the draft agreement;[658] and (4) the text of the agreement should explain which community members' lands will be affected by the agreement, or delineate which lands are covered by the potential agreement;[659] among other deficiencies.[660] Given these many problems, it is not clear that that *Acta* represents the will of the Concepción de Ingenio community, or that it could have any legal authority—quite apart from the fact that it was not yet a binding contract.

334. Importantly, after negotiating with each of the land-owing communities, Claimant would also have to negotiate agreements with each of 94 individual land *possessors*.[661] Although the communities own the land, they allocate plots to community families to live on and use.[662] Before it could construct the Santa Ana mine, Claimant would have had to reach agreements with each of these land possessors and, in many cases, relocate them to a different area. Claimant makes no mention of this step, aside from a claim that the process was

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[656] Peña Second Report at paras. 67-68 [Exhibit REX-008].

[657] Peña Second Report at paras. 69-70 [Exhibit REX-008].

[658] Peña Second Report at para. 71 [Exhibit REX-008].

[659] Peña Second Report at paras. 73-74 [Exhibit REX-008].

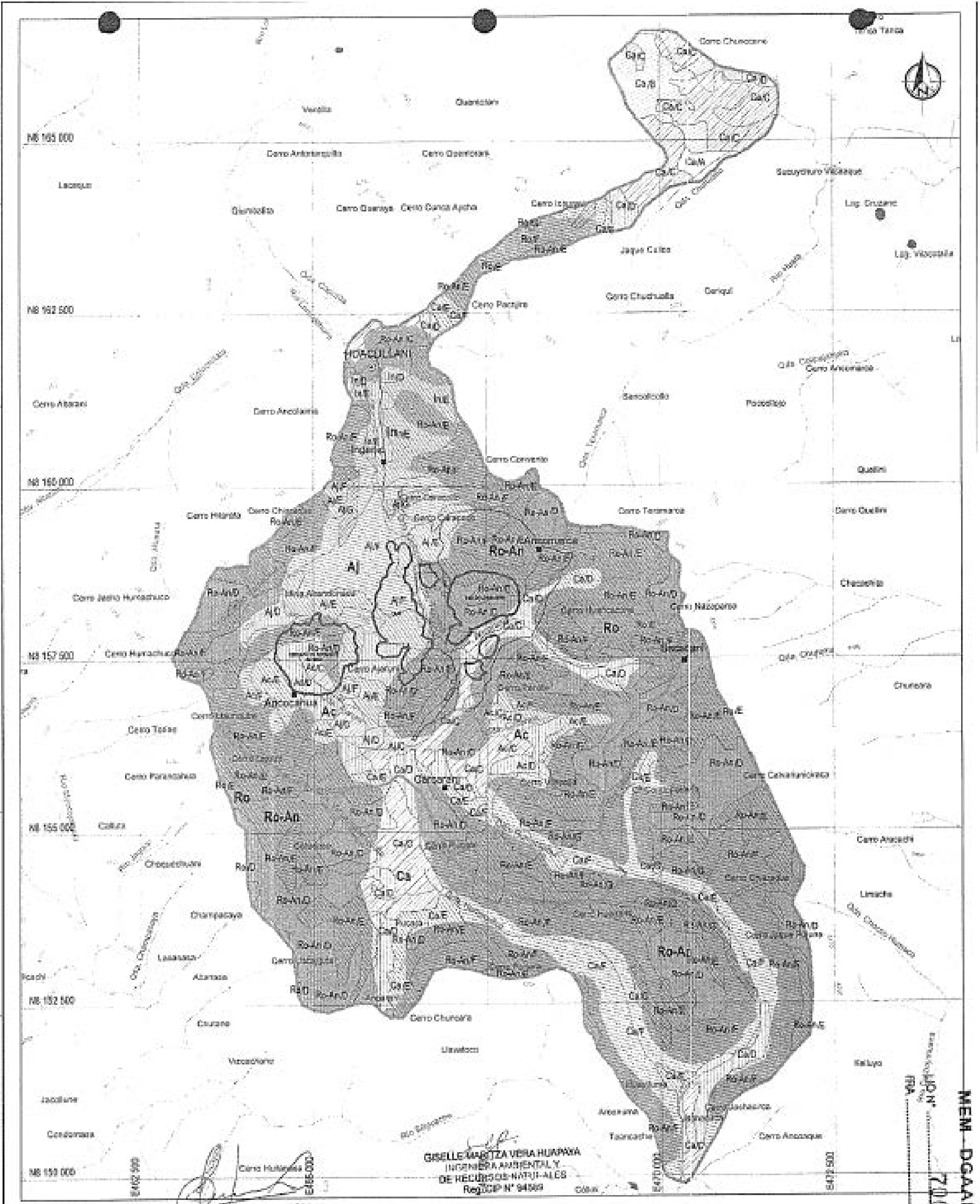
[660] Professor Peña also noted that the *Acta* did not explain how the draft agreement was negotiated, or how the technical, legal document was explained to the community writ large. Peña Second Report at paras. 72, 75-76 [Exhibit REX-008].

[661] *See* Rodríguez-Mariátegui Second Report at para. 111 [Exhibit REX-009]; EIA Executive Summary, Section 1.1 [Exhibit R-194].

[662] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009].

ongoing.[663] The following map, taken from Claimant's own responses to the DGAAM observations, shows the lands of the individual possessors that Claimant needed to acquire:

[663] *See* Claimant's Reply at paras. 99, 169.



Source: Maps Submitted by Bear Creek with Responses to EIA Observations, Annex Z.1 (Excerpts) [Exhibit R-398].

335. Agreements with the local land possessors do not require the same legal formalities as the agreements with the communities.[664] However, these individual agreements have their own challenges. The company is obligated to indemnify the land possessors, not only for the value of the land, but for other aspects such as the structures, the cultivated fields, and the grazing spaces.[665] Additionally, the company must reach an agreement to relocate the individuals onto new lands.[666] This relocation requirement is imposed on certain project financiers by the World Bank, but, even assuming that the Santa Ana financiers might not have been encumbered by this requirement, it is nevertheless necessary in practice in order to ensure that the communities and individuals on whose land the Project will operate have a physical space to continue with their lives. The *Acta* of the *comunidad* Concepción de Ingenio recognizes that negotiations with the individual possessors had yet to take place.[667] According to Dr. Rodriguez-Mariátegui, the final agreement with the community will usually include a reference to the place where the individual community members would be relocated.[668] The *Acta* with Concepción de Ingenio does not include any such location, which suggests that Claimant had not yet identified or negotiated over lands to which the land possessors would be moved.[669]

336. Claimant was likely to encounter delays and opposition during the process of acquiring the rights to the land constituting the Santa Ana Project. Although it claims that the negotiation process was progressing smoothly, the communities surrounding Santa Ana were growing in their opposition to the Project. As Professor Peña explains, these more numerous

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[664] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009].

[665] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009].

[666] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009].

[667] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009]; Acta de Asamblea General Extraordinaria de la Comunidad Campesina de Concepción de Ingenio, April 2, 2011, at Clause 6.3 [Exhibit C-0186].

[668] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009].

[669] Rodríguez-Mariátegui Second Report at para. 119 [Exhibit REX-009].

communities had already pressured the few communities that supported the Project until that support became untenable, and the communities opposing Santa Ana even forced the former supporters to participate in the 2011 protests against the Project.[670] There can be no assurance at all, contrary to what Claimant would have this Tribunal believe, that it would ever acquire the necessary land use rights to construct Santa Ana.

337. In an effort to portray that the local communities as supporting the Project—despite the ongoing protests that called for the Project's cancellation—Claimant puts forth letters from 2013 and 2014 that purportedly show "the local communities' continued support for Bear Creek and the Santa Ana Project."[671] It is with some irony that Claimant describes *these* letters—that allegedly support Claimant's position in this arbitration that it had attained community approval—as reflective of the community position, whereas Claimant dismisses the letters from other communities vehemently opposing the project as political theater.[672]

338. Claimant also misrepresents the content of the letters. For example, Claimant describes a May 15, 2013 letter from members of the Huacullani District, saying that the communities agreed that Claimant "had conducted a public hearing with a majority of the community expressing its support for the Project."[673] That is not what the letter says. As the block quotation in Claimant's Reply clearly states, the members of the Huacullani District

[670] Peña Second Report at para. 47 (discussing the majority of the Huacullani communities' threats and intense pressure to force the few Huacullani communities that supported the Project to fall in "single file" with the collective will against the Project) [Exhibit REX-008].

[671] Claimant's Reply at para. 183. *See also* Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarollo y La Inclución*, May 15, 2013 [Exhibit C-0118]; Memorandum from Members of the Huacullani District to MINEM, *Reactivación del Proyecto Santa Ana*, October 27, 2013 [Exhibit C-0119]; Memorandum from Members of the Huacullani District to Prime Minister of Perú, MINEM, and Bear Creek Mining, *Reiterativo Por El Desarollo y La Inclusión*, January 24, 2014 [Exhibit C-0120].

[672] *See* Claimant's Reply at para. 101 (Claimant stated that "the FDRN nor Mr. Advuviri should be considered as representatives of the Kelluyo, Desaguadero, Zepita, and Pisacoma communities, which are fully capable of making their voice heard on their own," even though the letters were signed by representatives of these communities.).

[673] Claimant's Reply at para. 185.

expressed that Claimant "had developed . . . the public hearing with an *attendance of the majority of the community*."[674] The letter does not describe majority *support* for Claimant at the public hearing, but rather that a majority of the community *attended* the public hearing. These are two very different expressions.

339. Claimant also states that the May 15, 2013 letter "insisted on the fact that Bear Creek's investments at Santa Ana were the driving force behind the communities' own economic development plans."[675] This is only partially true. The letter credits the "mining taxes and royalties" as spurring the communities' development plans, not any specific plans by Claimant to invest in the communities' welfare.[676] The mining taxes and royalties are mandatory under Peruvian law, and are not considered part of the citizen participation component.

340. The letters are also curious on their face. They do not explain *why* the communities decided to send the letters in May 2013, October 2013, and January 2014, years after the Santa Ana Project was stalled by Supreme Decree No. 032. No event is mentioned that convinced the communities to petition the Peruvian Government for the return of the Santa Ana Project at any of these times. Moreover, the May 2013 and January 2014 letters are virtually identical, and both were sent to Claimant, as well as the Peruvian Government. One has to wonder what role Claimant played in the drafting and sending of these letters, which could also

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[674] Claimant's Reply at para. 185; Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarollo y La Inclución*, May 15, 2013 [Exhibit C-0118] (emphasis added).

[675] Claimant's Reply at para. 184.

[676] Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarollo y La Inclución*, May 15, 2013 [Exhibit C-0118]. The letter later mentions that Claimant was "performing social programs and planning activities for the communities" but no concrete projects are mentioned.

explain the flowery and legalistic language in the letters[677] and the disproportionate focus on the importance of the mining sector, to the detriment of traditional Ayamara social and environmental concerns.

341. Finally, even if the communities drafted these letters themselves to express the communal will of some portions of the local population, these letters fit squarely within the explanation of the facts that Perú and its witnesses and experts have provided in this arbitration. A subset of the Huacullani communities, the purported drafters of these letters, stood to benefit from the Santa Ana Project through jobs and other payments. The immediately surrounding communities, such as those in Kelluyo, would not have received work through Claimant's job program and, instead, would suffer the social interruption and potential environmental degradation that comes with a large, open-pit mine. The opposition to the Project overwhelmed the limited support, both in strength and in numbers. It is Claimant that refuses to address the clear and unequivocal rejection of the Project from the surrounding communities. Additional letters from the self-interested Huacullani communities that hoped to benefit from the jobs that Claimant offered does not in any way disprove Perú's argument that the Project was broadly opposed by the rest of the communities throughout the southern part of Puno.

c. <u>Bear Creek had not acquired the many other permits and authorizations needed to construct and operate Santa Ana</u>

342. Even if it could have received DGAAM approval of its EIA and reached agreements with the four local communities and 94 land possessors for permission to construct and operate the mine, Claimant would then have had to obtain more than 40 other permits and authorizations before the Project could proceed. Dr. Rodriguez-Mariátegui listed the permits that

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[677] *See, e.g.* Memorandum from Members of the Huacullani District to the Prime Minister of Perú, MINEM and Bear Creek Mining, *Memorial Por El Desarollo y La Inclución*, May 15, 2013 (describing the "distribution of the mining taxes [*canon minero*] and [mining] royalties") [Exhibit C-0118].

Claimant lacked in his first report.[678] Claimant argues that obtaining all of these permits was a foregone conclusion, because the Government has no discretion to reject *any* of these potential applications.[679] This is incorrect.

343. As described above,[680] a petitioner cannot receive any of those permits until it meets the requirements contained in the respective laws. Although Perú's legal regime seeks to maintain predictability for companies seeking to operate mines, the laws also have broad, subjective elements to them (an acknowledgment that no two mining projects are the same). That leaves room for regulatory discretion and for good-faith, professional disagreement about whether the legal requirements for certain authorizations have been met.[681] Three of the more onerous authorizations, none of which Claimant had completed, are discussed below.

(i) Certification of Archaeological Remains ("CIRA")

344. Before it could proceed with the Santa Ana Project, Claimant had to obtain a certification from the Ministry of Culture that the Project would not disturb any archaeological remains. To do so, Claimant had to conduct a project of archaeological evaluation with an archaeologist, and create a final evaluation report to be submitted to the Ministry of Culture.[682] The Ministry of Culture would then review the evaluation and visit the site with the archaeologist to determine whether archaeological remains exist. Claimant had not begun this process.[683]

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[678] *See* Rodríguez-Mariátegui First Report at para. 107 [Exhibit REX-003]; Respondent's Counter-Memorial at para. 185.

[679] Claimant's Reply at para. 165.

[680] *See supra* at para. 308.

[681] Rodríguez-Mariátegui Second Report at paras. 61-64, 108 [Exhibit REX-009].

[682] Rodríguez-Mariátegui Second Report at paras. 122-23 [Exhibit REX-009].

[683] The Ministry of Culture confirms that it conducted a search of its electronic files and did not find any indication that Bear Creek or Ms. Villavicencio had begun the CIRA process. *See* Memorandum from the Ministry of Culture, Oficio No. 000242-2016/DGPA/VMPCIC/MC, February 26, 2016 [Exhibit R-413].

345. Instead, Claimant argues that it had already identified nine potential archaeological sites, which it described in its EIA, and that none of these sites were located near the "principal components of the Santa Ana Project, *i.e.*, the pit, the plant, the rock waste deposits, and the leaching pad."[684] Claimant admits in its map of the sites, however, that three of these nine sites were located within the Project's area of direct influence, and that one site was located on the area of the concession that Claimant planned to exploit.[685] The rest of the sites fall just outside the area of direct influence.[686] The existence of these sites meant that Claimant would have to submit its archaeological evaluation so that the Ministry of Culture could evaluate the sites to determine their cultural value. Until the Ministry of Culture conducted its review, there would be no certainty about the extent of the archaeological sites, or whether they extended into the areas planned for Santa Ana Project components.[687]

346. DGAAM Observation No. 150 requested that Claimant provide information about the process of archaeological evaluation, given that Claimant had identified archaeological sites within the Project's area of direct influence.[688] In response, Claimant asserted that it had confirmed at least two such sites within the area of direct influence, but that it was not yet in a position to present the archaeological evaluation. Claimant stated that it would do so during the CIRA process to come.[689] The fact that Claimant did not provide the evaluation to the DGAAM

[684] Claimant's Reply at para. 170 (citing Ausenco Vector, Plano de los Sitios Arqueológicos del Proyecto Santa Ana 2.31 [Exhibit C-0192]).

[685] Ausenco Vector, Plano de los Sitios Arqueológicos del Proyecto Santa Ana 2.31 [Exhibit C-0192]

[686] Ausenco Vector, Plano de los Sitios Arqueológicos del Proyecto Santa Ana 2.31 [Exhibit C-0192].

[687] Rodríguez-Mariátegui Second Report at paras. 125, 128 [Exhibit REX-009].

[688] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 224 [Exhibit R-184].

[689] Bear Creek's Responses to DGAAM's Observations to the Environmental Impact Study of the Santa Ana Project (without Annexes), July 2011, at p. 242 [Exhibit R-184].

at that time is a clear signal that it had not yet been completed and that Bear Creek was not in a position to begin the CIRA process.[690]

347. Claimant also claims that, even if the nine archaeological sites had been confirmed, "this would not have affected the operation of the Project," because Claimant could have taken measures to protect the remains without any such impact.[691] Again, this cannot be asserted with confidence before the evaluation by the Ministry of Culture is completed. The Ministry of Culture evaluation could discover that the archaeological sites extended beyond what Claimant had found, or that the sites were located where complementary mining structures were going to be built.[692] Any such discovery would have paralyzed the Project until the remains were adequately identified and protected.[693] To be fair, the existence of the archaeological sites most likely would not have resulted in the cancellation of the Project—but identifying and protecting archaeological sites in a major mining project is a significant undertaking, far more complicated than Claimant acknowledges, and it could have led to severe delays.

(ii) Mining Plan

348. Approval of a mining plan is another key step that Claimant would have been required to achieve before it could begin construction of the Santa Ana Project. The mining plan could not be submitted to the Ministry of Energy and Mines for review until after Claimant received approval of its EIA and reached agreements with all of the local communities to purchase or use the surface rights on their lands.[694] Claimant argues that this step (approval of the mining plan) would not have been difficult because most of the requirements for the mining

[690] Rodríguez-Mariátegui Second Report at para. 126 [Exhibit REX-009].

[691] Claimant's Reply at para. 170.

[692] Rodríguez-Mariátegui Second Report at para. 128 [Exhibit REX-009].

[693] Rodríguez-Mariátegui Second Report at para. 127 [Exhibit REX-009].

[694] Rodríguez-Mariátegui Second Report at paras. 74, 114 [Exhibit REX-009].

plan had already been completed during the EIA and the feasibility study processes.[695] Yet, as Dr. Rodriguez-Mariátegui points out, the observations to the EIA and Claimant's responses demonstrate that the EIA itself was not adequate.[696] Dr. Rodriguez-Mariátegui noted several occasions where the DGAAM asked Claimant for additional information at a higher level of detail than Claimant had provided.[697] If the EIA was not adequately specific, then elements of the mining plan completed as part of the EIA could likewise require more development.

349. Additionally, the focus of the EIA is on the technical environmental requirements, whereas the mining plan requires studies that demonstrate, among other things, the structural integrity of the planned mine.[698] The EIA and the mining plan do not completely overlap, as one might expect. Claimant cannot assume that the studies and information provided in the EIA—which had already been deemed insufficient and had not been approved—would be sufficient to prepare and gain approval of the mining plan.

(iii) Water Rights

350. Claimant would have to apply for the appropriate water permits and licenses. Claimant claims that it had already identified an adequate water supply source "with no adverse impacts on the environment."[699] It is difficult to say how Claimant can argue that removing water from an arid region for use in a large, open-pit silver mine can possibly have "*no* adverse impacts on the environment." Nonetheless, the DGAAM was still in the process of reviewing Claimant's EIA to determine the potential effects on the environment,[700] and after that, the ANA

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[695] Claimant's Reply at para. 171.

[696] Rodríguez-Mariátegui Second Report at paras. 129-130 [Exhibit REX-009].

[697] Rodríguez-Mariátegui Second Report at paras. 129-130 [Exhibit REX-009].

[698] Rodríguez-Mariátegui Second Report at para. 130 [Exhibit REX-009].

[699] Claimant's Reply at para. 173; Antunez de Mayolo Second Statement at para. 91.

[700] Rodríguez-Mariátegui First Report at para. 46 [Exhibit REX-003] (describing observations related to redirecting waterways (observation nos. 90, 111, 141) and available water volume limits observation nos. 23, 24, 99)).

would review whether or not the area had sufficient water resources to sustain both the large-scale mine *and* the needs of the surrounding communities.[701] Additionally, in May 2011, the Lake Titicaca Water System Binational Authority—an organization created by the Governments of Bolivia and Perú to protect and preserve the waters of the Lake Titicaca Water System—requested permission from the DGAAM to review Claimant's EIA because of the concerns expressed by the local communities about potential water contamination.[702] Until these processes were completed, the total impact of the mine on the surrounding water resources could not be determined.

d. Conclusion on obstacles to project completion

351. In sum, Claimant had not begun operating, constructing, or even applying for all the necessary permits and authorizations for the Santa Ana and Corani Projects. Nevertheless, Claimant has claimed damages for more than a decade of continuous mining revenue from two fully operating mines. It is Claimant's burden to show that, but for the two acts of which it complains (the EIA review suspension and Supreme Decree No. 032), these mines surely would have been constructed and would have yielded the income for which it claims damages in this arbitration. Claimant therefore must prove that, despite the ongoing strong community opposition and protests against the Santa Ana Project, it would have successfully: (1) resolved the DGAAM observations to the EIA, resulting in an approval of the environmental evaluation document; (2) negotiated to acquire the surface lands from all of the four communities that owned the lands and 94 individual possessors; and (3) acquired all the remaining permits and

[701] Rodríguez-Mariátegui Second Report at para. 132 [Exhibit REX-009].

[702] Letter 195/05/2011, Autoridad Binacional Autónoma del Sistema Hídrico del Lago Titicaca Rio Desaguadero Lago Poopo Salar de Coipasa, May 23, 2011 [Exhibit R-313]. Although the project would not have been located in the Lake Titicaca basin, it was located in the Rio Desaguadero basin, which is a part of the greater Lake Titicaca, Desaguadero, Lake Poopo water system. Bear Creek, Santa Ana Project Hydrolgy and Hydro-geology Feasibility Study, July 2011 at p. 2 [Exhibit R-302]. The Rio Desaguadero begins at Lake Titicaca and flows south through the city of Desaguadero, where protestors shut down the border town, and into Bolivia.

authorizations—including certification that the Project would not harm archaeological remains, approval of the mining plan, and permission to use the scarce water resources in the area. There are serious doubts as to whether Claimant, a junior mining company with no history of putting mines into production, would have been able to achieve any, much less all, of these steps.

2. Other Stalled Mining Projects in Perú Illustrate the Uncertainties of Mine Project Development, Including for Reasons Unrelated to Government Measures

352. The discussion just above demonstrates that Claimant was not yet even close to being in a position to construct or operate a mine at the Santa Ana site, because it had not yet acquired approval of its EIA, it had not acquired from the local communities the right to use the lands on which Santa Ana would be built, and it had not begun the process to obtain the other permits and authorizations necessary to construct and operate a mine. Moreover, it is evident, given the requirements described above, that opposition from the local communities can hinder a project, severely delay it, or even force its cancellation—even if the company obtains an EIA approval or other government approvals. Lacking the social license from affected communities can delay or thwart a mining project entirely, even apart from the company's official permitting and contracting processes.

353. In addition to Santa Ana, two examples of proposed mining projects in Perú help to illustrate this point. The proposed Conga mine—a project by Newmont Mining, a senior Colorado-based mining company with more than 90 years of experience that is currently operating mines on five continents[703]—stalled in late 2011, due to community opposition after

[703] *See* "Newmont Mining Corporation: About Us", available at http://www.newmont.com/about-us/default.aspx (last visited April 8, 2016) [Exhibit R-314]. Newmont Mining is the majority shareholder of Yanacocha, a Peruvian company constituted, to construct and operate the Yanacocha and Conga mines in Peru. *See* "Who we are, Yanacocha: Mining in Cajamarca that Respects the Environment," *available at* http://www.yanacocha.com/quienes-somos/ (last visited April 8, 2016)[Exhibit R-315].

the company conducted its public hearing and *after* the DGAAM approved the EIA.[704] Construction of the Conga project has not yet been completed. Community opposition has also stalled the proposed Tia Maria project. In 2011, the DGAAM rejected the first EIA presented by Southern Perú Copper—another senior mining company with substantial experience in operating mines, and the same company where several of Claimant's executives and directors have experience—in the midst of violent opposition to the project. The company had to submit a new EIA, which was approved in 2014, but the Tia Maria project still has not been constructed, as the protests have not abated.

a. Conga

354. In October 2010, the DGAAM approved the EIA submitted by Yanacocha, the Peruvian company owned by Newmont that directly owned the Conga concessions.[705] Yanacocha had conducted a public hearing on March 31, 2010, which was attended by 4,000 people.[706] Yanacocha had also conducted community participation exercises beginning in 2007, where thousands of participants attended community outreach programs such as guided tours, workshops, meetings, and focus groups.[707]

355. In late 2011, however, local communities, led by the Regional Government, began to protest against the Conga project, fearing that the mining operations would contaminate and reduce local water sources.[708] Yanacocha voluntarily suspended construction of the project

[704] *See* Newmont Mining, Conga Fact Sheet, June 2013 [Exhibit R-316].

[705] *See* Newmont Mining, Conga Fact Sheet, June 2013 [Exhibit R-316].

[706] *See* Newmont Mining, Conga Project Fact Sheet—Citizen Participation at p. 2 [Exhibit R-317].

[707] Newmont Mining, Conga Project Fact Sheet—Citizen Participation, at p. 3 (2,656 participants in 2007, 1,484 participants in 2008, 2,269 participants in 2009, 7,495 participants in 2010, and 2,008 participants in 2011) [Exhibit R-317].

[708] Stephen Leahy, Conflict with Local Communities Hits Mining and Oil Companies Where It Hurts, May 18, 2014, *available at* http://www.ipsnews.net/2014/05/conflictlocalcommunitieshitsminingoilcompanieshurts/) [Exhibit R-318].

in November 2011, in the midst of a general strike and wide-scale protests.[709] The protests nevertheless continued. Protestors blocked roads, engaged in city-wide strikes, and, in several unfortunate instances, clashed with Peruvian authorities, resulting in the deaths of a number of protestors.[710] The Peruvian Government requested that outside evaluators review the approved EIA in an effort to build legitimacy with the local communities,[711] conducted dialogues with the opposition groups—similar to the ones that tried to resolve the Santa Ana conflict[712]—and twice declared a state of emergency in an effort to return order to the area.[713] The result of the outside review was announced in April 2012, and it opined that the EIA was technically sound, but it still made recommendations to appease community concerns about the availability of water resources.[714]

356. As a result, in the company's own words, it "is taking a slower, 'water first' approach to developing Conga by focusing on the construction of reservoirs for downstream communities."[715] In keeping with accepted international practice, Newmont is evidently going

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[709] *See* Newmont Mining, Conga Fact Sheet, June 2013 [Exhibit R-316]. *See also* "Yanacocha suspends the Conga Mining Project and is open for Dialogue", *La Republica*, November 30, 2011, *available a*t http://larepublica.pe/30-11-2011/yanacocha-suspende-proyecto-en-mina-conga-y-da-paso-al-dialogo (last visited April 12, 2016) [Exhibit R-319].

[710] *See* "Three People are killed in Protests in Celedin Against Conga", *La Republic*, July 4, 2012, *available at* http://larepublica.pe/04-07-2012/protesta-contra-conga-en-celendin-deja-tres-muertos(last visited April 12, 2016) [Exhibit R-320]; "State of Emergency in Cajamarca Follows Four Deaths in Mine Protests," *Peruvian Times*, July 5, 2012, *available at* http://www.peruviantimes.com/05/state-of-emergency-in-cajamarca-follows-four-deaths-in-mine-protests/16170/ (last visited April 12, 2016) [Exhibit R-321].

[711] Newmont Mining, Conga Fact Sheet, June 2013 [Exhibit R-316].

[712] "Discussion Tables start Today on Conga without Cajamarca Authorities" *La Republica*, December 27, 2011 *available at* http://larepublica.pe/27-12-2011/hoy-se-instala-la-mesa-de-dialogo-por-conga-sin-autoridades-de-cajamarca (last visited April 12, 2016) [Exhibit R-322]; "The Executive Will meet Today with Cajamarca Mayors to Discuss the Conga Case" *La Republica*, November 1, 2011, *available a*t http://larepublica.pe/01-11-2011/ejecutivo-se-reune-hoy-con-alcaldes-de-cajamarca-para-ver-caso-conga (last visited April 12, 2016) [Exhibit R-323].

[713] "State of Emergency in Cajamarca Follows Four Deaths in Mine Protests," *Peruvian Times*, July 5, 2012, *available at* http://www.peruviantimes.com/05/state-of-emergency-in-cajamarca-follows-four-deaths-in-mine-protests/16170/ (last visited April 12, 2016) [Exhibit R-321].

[714] *See* Newmont Mining, Conga Fact Sheet, June 2013 [Exhibit R-316].

[715] *See* Newmont Mining, Conga Fact Sheet, June 2013 [Exhibit R-316].

beyond the bare minimum of Perú's mining laws—recall that the EIA has already been approved—to try to obtain a stronger social license from the local communities.[716] Newmont paused construction to focus on that community outreach. In fact, in April 2012, Yanacocha requested that the DGAAM officially suspend the review of additional exploration activities relating to the Conga project, and the DGAAM did so.[717] Newmont also added several additional community and social investment programs to its original plan, including constructing 60 schools and 24 medical posts, implementing a forestation plan for 10,000 hectares, and building water systems to deliver potable water to 50,000 local inhabitants.[718] Newmont and Yanacocha are clearly striving to obtain their social license, though they too may not succeed.

357. Claimant, by contrast, did not adjust its social outreach program when communities demanded the closure of the Santa Ana Project and continues to deny that its actions at Santa Ana caused or even contributed to any of the unrest in Puno.[719] Nor did Claimant pause its pursuit of the Santa Ana Project to work on building its social license.[720] It instead challenged the DGAAM's decision to suspend the EIA review for one year, claiming that the suspension was unwarranted because that the protests calling for the end of the Santa Ana Project could not be shown to be Claimant's fault. Claimant insists, against all evidence, that its social outreach was already sufficient.

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[716] *See supra* at paras. 123-125.

[717] Report on Request to Withdraw EIA Amendment Proceedings by Minera Yanacocha SRL, Report No. 673-2012-MEM-AAM/ACHM, June 18, 2012 [Exhibit R-326].

[718] Newmont Mining, Conga Project Update at p. 2 [Exhibit R-325].

[719] Centre for Social Responsibility in Mining, Listening to the City of Cajamarca: A Study Commissioned by Minera Yanacocha, March 1, 2013, at pp. 17-19 (describing internal interviews with company representatives of Minera Yanacocha wherein many executives recognized a social disconnect between the company and the communities in the Cajamarca region) [Exhibit R-327].

[720] *See* Swarthout Second Witness Statement at para. 29 ("Mr. Gala asked us to voluntarily suspend the Santa Ana Project for one year . . . [but] suspending the project for an entire year was not something we could do.").

b. Tia Maria

358. The Tia Maria Project is another example of a mining project that has been stalled due to widespread community opposition, even with an approved EIA. In 2009, Southern Perú Copper Corporation ("SPCC"), submitted its EIA to the DGAAM for approval, but it was rejected in 2011 as "unsalvageable"[721] after the DGAAM raised 138 observations and the EIA was also reviewed by a United Nations organization.[722] In November 2013, SPCC presented a second EIA, which was eventually approved in August 2014.[723]

359. However, affected communities rejected the project from the outset of the EIA review process; they claimed that the project would harm agriculture and the use of the nearby Río Tambo.[724] The communities also complained that the work that the company promised would not materialize.[725] People were injured and killed in the protests that followed.[726] The conflict has continued for four years, characterized by protests, a declaration of a 'State of Emergency', clashes between police, the military, and protestors, hundreds of injuries and at

[721] "Tia Maria Project is Declared Void," *La Republica*, April 9 2011, *available at* http://larepublica.pe/09-04-2011/declaran-nulo-el-proyecto-tia-maria-0 (last visited April 8, 2012) [Exhibit R-329].

[722] *See* "Tia Maria: MEM Dismisses the Third Environmental Impact Study," *La Republica*, May 27, 2015, *available at* http://larepublica.pe/sociedad/3361-tia-maria-mem-descarta-realizar-tercer-estudio-de-impacto-ambiental (last visited April 8, 2012) [Exhibit R-330]; Tia Maria Mining Project: "Dialogue and Information Responding to Questions, Dispelling Doubts, and Eliminating Fears," April 2015, at p. 3, *available at* http://www.southernperu.com/ESP/opinte/Documents/folletotiamaria.pdf (last visted April 12, 2016) [Exhibit R-240].

[723] Directorial Resolution Approving the EIA for Tia Maria, Directorial Resolution No. 392-2014-MEM/DGAAM, August 1, 2014 [Exhibit R-332].

[724] *See* "Tia Maria's Environmental Study Approval Causes Reaction in Peru," *Americaexonomica*, August 7, 2014, *available at* http://www.americaeconomia.com/negocios-industrias/rechazo-causa-aprobacion-de-estudio-ambiental-de-tia-maria-en-peru (last visited April 8, 2012) [Exhibit R-333].

[725] *See* "Tia Maria, The Long Conflict for the South," *La Republica*, March 7, 2011 *available at* http://larepublica.pe/27-03-2011/tia-maria-el-largo-conflicto-del-sur (last visited April 8, 2012) [Exhibit R-334].

[726] *See* Tia Maria's Environmental Study Approval Causes Reaction in Peru," *Americaexonomica*, August 7, 2014, *available at* http://www.americaeconomia.com/negocios-industrias/rechazo-causa-aprobacion-de-estudio-ambiental-de-tia-maria-en-peru (last visited April 8, 2012) [Exhibit R-333].

least seven deaths.[727] For its part, SPCC has published literature trying to dispel some of the community perceptions about the Tia Maria Project, including misconceptions that the mine would be located in the Rio Tambo Valley or that the project would draw water from the river itself.[728] The Government of Perú has also conducted dialogue with the communities in an effort to alleviate their concerns.[729] These explanations have not calmed the conflict. Despite approval of the EIA, the future of the project is uncertain.[730]

360. These examples are not intended to suggest that the Peruvian people as a whole oppose mining. To the contrary, mining is an important industry in Perú that the Government encourages when it is conducted responsibly. However, if a company fails to earn the social license to operate, then community opposition can stall, or even prevent, a project from going forward. This can happen regardless of the stage in the process: before the EIA is granted, during the DGAAM's EIA review, or even after the DGAAM approves the EIA. Even the most experienced mining companies in the world—senior companies with decades of experience operating mines such as Newmont and SPCC—can struggle with implementing adequate community relations plans. Claimant, by contrast, is a junior mining company that elected to work with only a small subset of the communities that would be affected by the Santa Ana

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[727] "Protests in Peru Against Copper Mine Project Leaves One Dead", *Wall Street Journal*, May 5, 2015, *available at* http://www.wsj.com/articles/protests-in-peru-against-copper-mine-project-leaves-one-dead-1430862159 (last visited April 8, 2012) [Exhibit R-335].

[728] Tia Maria Mining Project: "Dialogue and Information Responding to Questions, Dispelling Doubts, and Eliminating Fears," April 2015, at pp. 4-6, 7-8, *available at* http://www.southernperu.com/ESP/opinte/Documents/folletotiamaria.pdf (last visted April 12, 2016) [Exhibit R-240].

[729] Tia Maria Mining Project: "Dialogue and Information Responding to Questions, Dispelling Doubts, and Eliminating Fears," April 2015, at p. 15, *available at* http://www.southernperu.com/ESP/opinte/Documents/folletotiamaria.pdf (last visted April 12, 2016) [Exhibit R-240].

[730] "Southern Copper Scraps Tia Maria Copper Project in Peru," *The Wall Street Journal*, March 27, 2015 *available at* http://www.wsj.com/articles/southern-copper-scraps-tia-maria-copper-project-in-peru-1427471246 (last visited April 8, 2012) [Exhibit R-336]

Project. The 2011 protests belie Claimant's argument that it enjoyed the support of the affected communities; it had no social license. Claimant's insistence that it would have completed the Santa Ana Project and operated it successfully for years in the social atmosphere that Claimant created is implausible and simply naïve.

III. THE TRIBUNAL LACKS JURISDICTION TO HEAR CLAIMANT'S CLAIMS

361. The Tribunal lacks jurisdiction to decide Claimant's claims because the investment on which its claims purportedly rest, the Santa Ana concessions, was obtained through a scheme that violated Article 71 of the Peruvian Constitution. Fundamental principles of international law dictate that Claimant's case must be dismissed.

362. In its Counter-Memorial, Respondent established that Claimant bears the burden of proving the factual prerequisites for jurisdiction.[731] Claimant did not address this issue in its Reply,[732] thereby accepting that it must demonstrate to this Tribunal that it lawfully made and held an investment in Perú.[733] Failure to do so must result in dismissal of the claims, either for lack of jurisdiction or on grounds of inadmissibility.

363. To protect its case, Claimant finds itself having to make the rather remarkable argument that neither the FTA nor international law principles require it to have obtained its investment lawfully and in good faith. As Respondent has shown, however, international tribunals have held that an investor that illegally obtains an investment cannot benefit from the dispute resolution mechanisms or the substantive protections of an international investment

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[731] *See* Respondent's Counter-Memorial at para. 197.

[732] Claimant does, in one sentence and without citing any arbitral decisions argue that Respondent bears the burden of proving the *legal* principle that "illegality is a jurisdictional impediment implied by international law and the ICSID system." Claimant's Reply at para. 226. This is not true. The burden of proof applies to proving the factual record and it is then the Tribunal's task to apply the law to those facts. *See* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 335 ("[I]t may be said that the aim of a judicial inquiry is to establish the truth of a case, to which the law may then be applied.") [Exhibit RLA-047 *bis*].

[733] *See* Respondent's Counter-Memorial at paras. 207-21.

treaty. Claimant also attempts to estop Respondent entirely from arguing that the investment was illegal. This argument fails, however, as Claimant cannot identify a single instance when, knowing the full breadth of Claimant's acquisition scheme, Respondent clearly and unequivocally approved Claimant's scheme. Far from knowingly approving Claimant's violation of Article 71, when Respondent learned from local community leaders that Claimant had indirectly acquired and held the concessions through a sham petitioner, Respondent revoked the previously granted public necessity decree and instituted civil proceedings to nullify Claimant's acquisition of those concessions based on the constitutional violation. Estoppel prevents a party from taking a diametrically opposite position to one taken previously, but Respondent's position in this arbitration is entirely consistent with the actions it is taking in its own domestic courts.

364. This Section III first discusses the established international law principle that prevents an investor from receiving the benefits of investment treaty arbitration—meaning access to the dispute resolution mechanisms or, at least, the substantive treaty protections—if it has acquired its investment by violating the domestic law of the host State or by acting in bad faith. It then recalls how Claimant illegally acquired the Santa Ana concessions through fraud and deceit (as also discussed in Section II.B above), such that the Tribunal must dismiss Claimant's claims either for lack of jurisdiction or because the claims are inadmissible. Next, it rebuts Claimant's erroneous argument that Respondent is estopped from arguing that Claimant acquired the Santa Ana concessions illegally. Finally, it explains that Claimant's investment is invalid under Peruvian law such that Claimant has no investment over which the Tribunal can claim jurisdiction, and, in any event, Claimant does not hold the investments on which it bases

its Treaty claims, because it has never possessed the right to a "mining project" nor a "right to mine."

A. INVESTMENT TREATY ARBITRATION AND THE ICSID ARBITRAL PROCESS DO NOT PROTECT UNLAWFUL INVESTMENTS OR THOSE MADE IN BAD FAITH

1. Investments That Are Made in Violation of the Law of the Host State Are Not Protected

365. Claimant's unlawfully-made investment bars the Tribunal from exercising jurisdiction over or admitting Claimant's claims. In its Counter-Memorial, Respondent cited several cases that embraced the general principle that an investment must have been lawfully obtained under the domestic laws of the host State for a tribunal to reach the substantive merits of its claims.[734] Claimant responded in its Reply by belittling several of those decisions,[735] mischaracterizing the content of the decisions, and/or attempting to distinguish them based on the treaty language or the facts of the case. Most importantly, however, Claimant has also tried to obscure the doctrine, representing, for example, that certain tribunals agreed to exercise jurisdiction while choosing not to address that the tribunals simultaneously found the claims to be inadmissible due to the investment's illegality.[736] While conceptually distinct, a tribunal's refusal to hear the claimant's claims on either of these bases (lack of jurisdiction or inadmissibility of the claims) yields the same result: in either instance, Claimant's treaty case is

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[734] *See* Respondent's Counter-Memorial at paras. 199-202.

[735] *See, e.g.*, Claimant's Reply at para. 221 ("[T]he tribunal in *SAUR* opined on the existence of an implicit requirement of legality and good faith, [but] *it undertook no analysis* to substantiate this opinion . . . .") (emphasis added) (referencing *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012 ("*SAUR*, decision on Jurisdiction"). at paras. 308, 311 [Exhibit RLA-023]).

[736] *Compare* Claimant's Reply at para. 219 ("*Plama* . . . supports Claimant's position that any alleged illegality or bad faith on the part of Claimant might impact the Tribunal's adjudication of Claimant's case on the merits, but it does not defeat the Tribunal's jurisdiction.") with *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, August 27, 2008 ("*Plama*, Award"), at para. 139 ("The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law."), 146 ("[T]his Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT.") [Exhibit CL-0104].

dismissed.[737] After sweeping aside Claimant's rhetoric and word play, the fact remains that international consensus dictates that Claimant must establish the legality of its investment or else it is not entitled to invoke the FTA's substantive protections in this proceeding.

366. In its Counter-Memorial, Respondent discussed the *Phoenix Action* tribunal's unambiguous conclusion that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws. . . . These are illegal investments according to the national law of the host State and cannot be protected through an ICSID arbitral process."[738] Claimant attempted to reduce this clear statement, along with a similar determination by the *Hamester* tribunal (discussed below), to mere "musings" that constitute nothing but "dicta," while also noting that the decisions "have been heavily criticized for their reasoning (or rather lack thereof)."[739] Claimant's unfounded attacks also engulfed the

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[737] *See, e.g.*, *Waste Management Inc. v. United Mexican States I*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion, June 2, 2000, at para. 58 ("Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. . . . Moreover, a claim of lack of jurisdiction ought normally be decided without trenching upon the merits of the case at all; in some instances, however, this will not be possible. Likewise, a tribunal may be able to determine a challenge to the admissibility of a claim without invading the merits of the case, but it is more likely that such an examination will have to be postponed and joined to the merits.") [Exhibit RLA-081]; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, at para. 33 ("The distinction between admissibility and jurisdiction does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competence. A successful admissibility objection would normally result in rejecting a claim for reasons connected with the merits.") [Exhibit RLA-082].

[738] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, April 15, 2009 ("*Phoenix Action*, Award"), at para. 101 [Exhibit RLA-020].

[739] Claimant's Reply at para. 221 (citing only one article for its proposition that these cases "have been heavily criticized for their reasoning (or rather lack thereof)", Douglas, "The Plea of Illegality in Investment Treaty Arbitration," which provides minimal discussion of the *Phoenix Action* reasoning). It is also notable that Douglas ultimately concludes that claims regarding investments that were obtained illegally in violation of international public policy principles *should* be rejected as inadmissible "in a preliminary phase of the arbitration," without reaching the merits of the claim. According to Douglas, "[t]he concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute . . . ." *See* Douglas, "The Pleas of Illegality in Investment Treaty Arbitration," at p. 26 [Exhibit CL-0170]. The *Plama v. Bulgaria* tribunal held that procuring an investment through fraud constitutes a violation of international public policy for this purpose. *See Plama*, Award at para. 135 ("The investment . . . was, therefore, the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares to an entity that did not have the financial and managerial capacities required to resume operation of the Refinery.") [Exhibit CL-0104].

SAUR v. Argentina decision which, according to Claimant, "undertook no analysis to substantiate [its] opinion,"[740] and the *Mamidoil* decision, which Claimant represents did not involve "any analysis whatsoever."[741] Claimant's belittling of the analysis conducted by these tribunals is unbecoming.

367. But even setting niceties aside, Claimant cannot escape the language of the *Phoenix Action* decision: "The core lesson is that the purpose of the international protection through ICSID arbitration cannot be granted to investments that are made contrary to law. The fact that an investment is in violation of the laws of the host State can be manifest and will therefore allow the tribunal to deny its jurisdiction," regardless of whether the applicable treaty expressly states that the investment must be made in accordance with the laws of the host State.[742] Moreover, contrary to Claimant's suggestion that its reasoning has been "heavily criticized," *Phoenix Action*'s discussion of the legality requirement has been cited with approval by at least seven other investment arbitration tribunals.[743]

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[740] Claimant's Reply at para. 221.

[741] Claimant's Reply at para. 217.

[742] *Phoenix Action*, Award at para. 102 [Exhibit RLA-020]. *See also id.* at para. 100 ("The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system.") [Exhibit RLA-020].

[743] This count conservatively treats three *Yukos*-related awards as a single instance. *See Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, March 30, 2015 ("*Mamidoil*, Award"), at para. 373 [Exhibit RLA-017]; *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, November 18, 2014 ("*Flughafen*, Award"), at para. 132 [Exhibit CL-0112] [in Spanish]; *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award, July 18, 2014, at paras. 1351-52 [Exhibit RLA-084]; *Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award, July 18, 2014, at paras. 1351-52 [Exhibit RLA-085]; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award, July 18, 2014 ("*Yukos Universal*, Final Award"), at paras. 1351-52 [Exhibit RLA-018]; *Achmea B.V. (formerly known as Eureko B.V.) v. The Slovak Republic [I]*, PCA Case No. 2008-13, Final Award, December 7, 2012, at paras. 171-73 [Exhibit RLA-086]; *Khan Resources Inc., et al. v. The Government of Mongolia*, UNCITRAL, Decision on Jurisdiction, July 25, 2012 ("*Khan Resources*, Decision on Jurisdiction"), at paras. 382-83 [Exhibit RLA-019]; *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012, at para. 308 [Exhibit RLA-023]; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Perú*, ICSID Case No. ARB/10/2, Final Award, May 21, 2013, at para. 391

368. Were the *Phoenix Action* tribunal's analysis of the purpose of ICSID arbitration an outlier, perhaps Claimant's criticisms would have merit. Unfortunately for Claimant, however, that is not the case;[744] other tribunals have affirmed this same principle. The *Hamester* tribunal (in what Claimant also dismissed as "musings") stated:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law (as elaborated, *e.g.* by the tribunal in *Phoenix [Action]*.[745]

369. Also contrary to Claimant's arguments, the legality requirement for making an investment cannot be discarded simply because there is no specific textual carve-out of illegal investments in the Perú-Canada FTA.[746] The requirement does not arise out of specific treaty text, but rather out of the *corpus* of international law and persuasive international arbitration jurisprudence. The *Hamester* tribunal called it a "general principle[] that exist[s] independently of specific language to this effect in the Treaty."[747] Other tribunals have agreed, drawing from the goals of international investment protection as a whole. The *SAUR v. Argentina* tribunal stated that "it understands that the purpose of the system of investor arbitration stems from protection of only legal and *bona fide* investments," a principle, the tribunal confirmed, that

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[Exhibit RLA-087] [in Spanish]. Only the *Metal-Tech v. Uzbekistan* disagreed with the *Phoenix Action* tribunal's conclusion, and even that was limited to what appears to be a misunderstanding that *Phoenix Action* held that legality and good faith are part of the definition of "investment" under Article 25(1) of the ICSID Convention. *See Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, October 4, 2013, at para. 127 [Exhibit RLA-088].

[744] In fact, the *Phoenix Action* tribunal relied on reasoned decisions such as *Plama v. Bulgaria*, *Fraport v. Philippines* ("*Fraport I*, Award"), *World Duty Free Company Limited v. Republic of Kenya*, and others. *See Phoenix Action*, Award at paras. 100-05 [Exhibit RLA-020].

[745] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 ("*Hamester*, Award"), at para. 123 [Exhibit RLA-022].

[746] Claimant's Reply at para. 213.

[747] *Hamester*, Award at para. 124 [Exhibit RLA-022].

applies regardless of whether the text of the treaty makes specific reference to legality under domestic law.[748] In *Minnotte and Lewis v. Poland*, the tribunal held that "it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State's law."[749] The *Flughafen v. Venezuela* tribunal similarly reasoned that "even if there is no explicit reference in the [BIT], the requirement of not having committed a serious violation of the law of the receiving State would be an implied condition, inserted in all [BITs], that it cannot be understood in any case that a State is offering the benefit of investment arbitration protection if the investor, to gain such protection, has committed a serious unlawful act."[750] And, perhaps the most emphatic decision comes from the *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v. Burkina Faso* decision: "It would be shocking . . . to see the Claimant, which has engaged in wilful misconduct, being made whole for an alleged loss."[751]

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[748] *SAUR*, Decision on Jurisdiction and Liability at para. 308 ("However the Tribunal also partially agrees with the argument put forward by Argentina. The Tribunal understands that the purpose of the investment arbitration system is in protect only legal and *bona fide* investments. The fact that the BIT between France and Argentina mentions or fails to mention the requirement that the investor has acted in accordance with domestic law, does not constitute a relevant factor. The requirement to not to have committed a serious violation of the law is a tacit condition, implanted in every BIT, because it should not be understood under any circumstance that a State is offering the benefit of protection through investment arbitration, if the investor, to achieve such protection, has incurred an unlawful action.") [Exhibit RLA-023].

[749] *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014, at para. 131 [Exhibit RLA-024].

[750] *Flughafen*, Award at para. 132 ("And even if there is no express reference in BIT, the requirement of not having committed a serious violation of the host state's law would be a tacit condition that exists in every BIT. Under no circumstance is the State offering protection through investment arbitration, if the investor, to achieve such protection, has incurred an unlawful action..") [Exhibit CL-0112].

[751] *Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v. Burkina Faso*, ICSID Case No.ARB/97/1, Award, January 19, 2000 (Extracts), para. 6.33 [Exhibit RLA-089] [in French]. There are other examples as well. *See Mamidoil*, Award at para. 372 ("The Tribunal finds that an investment can be illegal and as a consequence not protected by investment conventions when it contravenes substantive law, in other words when it does not comply with material norms regulating investments. Norms may prohibit certain business activities, such as the production of drugs, or they may reserve certain sectors to national entities or protect certain sectorial or geographical areas, for example, by making an investment in a national park illegal.") [RLA-017]; *Yukos Universal*, Final Award at para. 1352 ("An investor who has obtained an investment in the host state only by acting in bad faith

370. Claimant cannot write off each of these holdings as mere "musings" with (in Claimant's view) insufficient analysis. Rather, the tribunals all acknowledge a proposition that should be self-evident: A claimant that acquires its investment only through some unlawful act that goes to the heart of the investment cannot be rewarded with access to international dispute resolution mechanisms in defense of its unlawful investment.[752] An international tribunal cannot give effect to rights that were acquired unlawfully in the host State.

371. Faced with this list of cases supporting Respondent's position, Claimant resorts to nitpicking a handful of decisions—and in some cases, misrepresenting their holdings—in a futile effort to regain some ground. For example, it is surprising that Claimant represents that *Plama* "supports Claimant's position."[753] It does not. Claimant quotes extensively from the *Plama* Decision on Jurisdiction in an effort to show that the State's allegation in that case that the claimant did not legally acquire its investment did not end the proceeding at that initial stage. Instead, as Claimant notes, the *Plama* tribunal held a hearing on the merits, where it was confirmed that the claimant had acquired its investment illegally. As a result, the tribunal "conclude[d] that the substantive protections of the ECT cannot apply to investments that are

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or in violation of the laws of the host state, has brought itself within the scope of application of the [Treaty] through wrongful acts. Such an investor should not be allowed to benefit from the Treaty.") [Exhibit RLA-018]; *Khan Resources*, Decision on Jurisdiction at para. 383 ("This is logical. An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditur propriam turpitudinem allegans*.") [Exhibit RLA-019]; *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000, at para. 111 (noting that if it were proven that the leases comprising the investment were obtained through fraud, it would constitute "ground for dismissal of this claim") [Exhibit CL-0147]; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, UNCITRAL, Final Award, December 15, 2014 ("*Hesham Talaat M. Al-Warraq v. Indonesia*, Final Award"), at paras. 644-48 (finding that the claim was inadmissible, and therefore dismissed, because the claimant had taken actions "prejudicial to the public interest . . . breached the local laws and put the public interest at risk," thereby running afoul of the doctrine of clean hands) [Exhibit CL-0075].

[752] *See* Bin Cheng, GENERAL PRINCIPLES AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 155 ("The principle *ex delicto non oritur actio* [or, an unlawful act cannot serve as the basis of an action in law] is generally upheld by international tribunals.") (1953) [Exhibit RLA-047 *bis*].

[753] Claimant's Reply at para. 219.

made contrary to law."[754] Claimant here places undue weight on the fact that the *Plama* claimant proceeded past the jurisdictional phase because, in Claimant's words, "illegality raised questions on the merits."[755] But this is a pyrrhic victory. The key conclusion to take from the *Plama* decision is that, regardless of whether the Tribunal decides the case on grounds of jurisdiction or grounds of inadmissibility, like Plama, Claimant here is "not entitled to any of the substantive protections afforded by the" FTA.[756]

372. Claimant also points to the fact that the *Yukos* tribunal "expressly declined to decide whether alleged illegality operates as a bar to jurisdiction or as a bar to substantive protections."[757] This is true, but irrelevant. The tribunal also made it clear that:[758]

> In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. *Such an investor should not be allowed to benefit from the Treaty.*

373. Again, whether the Tribunal dismisses Claimant's claims because it lacks jurisdiction or because the claims are inadmissible, it is clear that the legality requirement, in the words of the *Yukos* tribunal, "deprive[s] claimants of the substantive protections" of the applicable treaty."[759] Similarly, Claimant finds comfort in the fact that the tribunal in *Khan Resources v. Mongolia* did not dismiss the claims at the jurisdiction phase, but rather deferred

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[754] *Plama*, Award at para. 139 [Exhibit CL-0104].

[755] Claimant's Reply at para. 224.

[756] *Plama*, Award at para. 325(3) [Exhibit CL-0104].

[757] Claimant's Reply at para. 218.

[758] *Yukos Universal*, Final Award at para. 1352 (emphasis added) [Exhibit RLA-018].

[759] *Yukos Universal*, Final Award at para. 1353 [Exhibit RLA-018].

the issue to the later merits phase.[760] However, the *Khan* tribunal declared in its decision on jurisdiction that "[a]n investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result."[761] And on a practical level, Claimant's proposed distinction between denying protection to illegally-obtained investments at the jurisdiction phase and denying protection to illegally-obtained investments at the merits phase does Claimant little good here, where the two phases have not been separated.

374. Claimant also points to the case of *Malicorp v. Egypt*, where the tribunal found that the claimant's fraudulent representations to enter into a concession contract with the respondent did not defeat the State's consent to arbitration contained in the applicable treaty.[762] Nevertheless, this case does not assist Claimant's cause. First, the *Malicorp* dispute arose out of a contractual arrangement, such that the tribunal was not asked to decide whether the investment was made in compliance with domestic law, but rather, whether the fraud and misrepresentations of the claimant made the contract between the parties defective and justified respondent's rescission of the contract.[763] Second, despite the tribunal's exercise of jurisdiction over the dispute, the tribunal did insist that "[i]t is indisputable, and this Arbitral Tribunal can do no more than confirm it, that the safeguarding of good faith is one of the fundamental principles of

[760] Claimant's Reply at para. 218.

[761] *Khan Resources*, Decision on Jurisdiction at para. 383 [Exhibit RLA-019].

[762] Claimant's Reply at para. 225 (discussing *Malicorp v. Egypt*, ICSID Case No. ARB/08/18, Award, February 7, 2011 ("*Malicorp*, Award"), at para. 119 [Exhibit CL-0173]. Claimant ignores that the tribunal's exercise of jurisdiction was decided, in part, on the practical grounds that it is difficult to determine whether fraud or other misconduct has occurred until the parties develop the factual record. *Id.* ("The factual analyses . . . most often requires an in-depth examination, which is difficult to separate out as the facts may be closely interwoven. The existence, nature and value of the investment are in large part verified through the same process of inquiry, thus it is preferable to examine and deal with all aspects simultaneously.") [Exhibit CL-0173].

[763] *See Malicorp*, Award at paras. 125 *et. seq.* [Exhibit CL-0173].

international law and the law of investments."[764] The tribunal went on to note that the principle of good faith would be violated when the alleged "investment" was obtained through corruption, deception, or fraud and that, in that case, "the [legal] defect undermines not only the right to invoke the protection of an agreement, but also the investment alleged to have been made by the party seeking protection."[765] Third, although the *Malicorp* tribunal ultimately addressed the merits of claimant's claim, it focused almost exclusively on the fact that respondent had only entered into the concession contract due to claimant's fraud in order to find that the respondent did not expropriate claimant's rights when it terminated the concession contract upon learning of claimant's misconduct.[766] This holding hardly benefits Claimant. To the contrary, it suggests by analogy that, even if the Tribunal were to proceed to the merits of Claimant's substantive claims here, the Tribunal should nevertheless find that Respondent's revocation of the public necessity declaration was justified by the discovery of Claimant's own misconduct.

375. Claimant refers to the *Mamidoil* decision as one where the "illegality of the claimant's investment [] did not defeat the ICSID tribunal's jurisdiction."[767] However, the tribunal there did not support Claimant's general proposition that legality of an investment is not a prerequisite to accessing investment arbitration or benefiting from investment protections. Instead, the *Mamidoil* tribunal pointed out that "not every type of non-compliance with national legislation bars the protection of an investment . . . it is evident that there must be an inner link between the illegal act and the investment itself."[768] In the *Mamidoil* case, the investor

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[764] *Malicorp*, Award at para. 116 [Exhibit CL-0173].

[765] *Malicorp*, Award at para. 116 [Exhibit CL-0173].

[766] *See Malicorp*, Award at paras. 130-37, 142-43 [Exhibit CL-0173]. The other ground for excusing respondent's rescission of the contract was claimant's failure to abide by its own obligations under the contract.

[767] Claimant's Reply at para. 217.

[768] *Mamidoil*, Award at para. 481 [Exhibit RLA-017].

constructed an oil container terminal without the necessary construction permits.[769] The tribunal there was thus drawing a distinction between an investor that makes an investment only through illegal activity (such as Claimant's Santa Ana Project in this case) and an investor that commits illegal acts related to the investment, but after the investment has been made. The tribunal concluded that it could exercise jurisdiction in the latter situation, which does not arise in this case. And even then, the *Mamidoil* tribunal cautioned that "a State cannot be expected to have consented to an arbitral dispute settlement mechanism for investments made in violation of its legislation."[770]

376. Apart from going through considerable gymnastics to try (in vain) to distinguish Respondent's cases, Claimant cites two cases, both under the Energy Charter Treaty, that it sees as supporting its position that legality is not a requirement to reach the merits in an investment arbitration—and one of those two cases reached a result more consonant with Respondent's position. In *Liman Caspian Oil v. Kazakhstan*, the tribunal first speculated that, even if the investment breached domestic law at the outset, "it *could be argued* that an investment had still been made" such that the tribunal could exercise jurisdiction.[771] Later in the opinion, however, the tribunal took up the closely related question of whether the investment should receive protection as a matter of public policy. There, the tribunal concluded definitively that "it does

[769] *See Mamidoil*, Award at paras. 55, 457 [Exhibit RLA-017].

[770] *Mamidoil*, Award at para. 494 [Exhibit RLA-017].

[771] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (Excerpts), June 22, 2010 ("*Liman Caspian Oil*, Award (Excerpts)"), at para. 187 (emphasis added) [Exhibit CL-0169]. In the same paragraph, the tribunal explained that the respondent had argued that the investment was "not invalid, but only voidable" making it unnecessary to reach a definitive conclusion about whether an investment that failed from the outset to comply with domestic law would deny jurisdiction to the tribunal. *Id.* at para. 187 [Exhibit CL-0169].

not have jurisdiction over investments made in violation of international public policy" such as through fraud or bribery.[772]

377. Finally, finding little (if any) support for its argument in the body of international jurisprudence, Claimant has devised an argument that Perú and Canada affirmatively "agreed that the legality requirement would be explicitly excluded from the scope of the FTA."[773] It strains credibility to suggest that Canada and Perú *intended* their FTA to protect unlawful investments, much less that they made such protection explicit in the text. And, in fact, the FTA evinces no such intent. Claimant's argument blatantly misreads Article 816 of the FTA, which states in full:

> Nothing in Article 803 [the Article related to National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of covered investments, such as a requirement that investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Chapter.[774]

378. First, it is clear that this provision relates to substantive protections under the FTA (*i.e.* national treatment) and not to matters of jurisdiction. Second, Article 816 has nothing to do with the international law principle requiring lawful investments, and instead discusses the ability of a State to enact domestic legislation governing procedures for foreign investment.

379. A plain reading of the language of Article 816 reveals that it does nothing more than to declare that, if one of the parties were to create "special formalities" (*i.e.*, domestic laws

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[772] *Liman Caspian Oil*, Award (Excerpts) at para. 194 [Exhibit CL-0169]. The tribunal nevertheless found that, on the facts, a showing of fraud or bribery had not been made.

[773] Claimant's Reply at para. 213.

[774] Free Trade Agreement Between Canada and the Republic of Perú (Excerpts), August 1, 2009, at Art. 816 [Exhibit R-390].

or regulations) specifying how investments must be established in the host State, these rules would not give rise to a violation of the national treatment standard, unless they "materially impair" the protections otherwise afforded to investors in the FTA. In other words, domestic regulations that create substantive or procedural requirements for a foreign investor are permissible, so long as they do not materially impair the other protections available to an investor under the FTA.[775] Conceptually, Article 816 should be read as a carve-out to the FTA's national treatment provision—one that allows a State to limit or specify the process by which foreign investments are established within its borders—that is wholly irrelevant to a determination of whether disputes arising from unlawfully made investments may be decided in an investment arbitration. The language does not "explicitly exclude[]" the legality requirement from the FTA, as Claimant argues, or it would have done so in plain and clear language that did not require the convoluted interpretation that Claimant offers.

2. Investments That Are Made in Bad Faith Are Not Protected

380. In its Counter-Memorial, Respondent explained that investments that violate the international law principle of good faith cannot receive substantive protections contained in international instruments.[776] On that basis, even if (for example) the Tribunal preferred to leave to Perú's courts the question of whether Bear Creek's acquisition of the concessions through Ms. Villavicencio violated Peruvian law, the Tribunal could still decline jurisdiction on a finding that Claimant's scheme to circumvent Article 71 of Perú's Constitution was not adopted in good faith.

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[775] *See* Brown COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 810-11 (analyzing a nearly identical provision of the U.S. model BIT, on which Claimant has relied as a legitimate interpretation of the FTA, stating that this Article "qualifies the scope of [the provision] on national treatment with respect to special formalities . . . Accordingly, where a claimant raises a national treatment claim based on a measure that the respondent State maintains is a special formality, it may invoke [Article 816] as a defense . . . .") [Exhibit CL-0179].

[776] *See* Respondent's Counter-Memorial at paras. 203-206.

381. Several arbitral tribunals have emphasized that investments not made in good faith should not be protected by investment treaties. The *Inceysa* tribunal, for example, declared that "[n]o legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them."[777] The tribunal in *InterTrade Holding v. Czech Republic* concurred,[778] as did the *Khan v. Mongolia* tribunal:

> An investor who has obtained its investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought him or herself within the scope of application of the [treaty] only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim *nemo auditor propriam turpitudinem allegans*.[779]

382. These tribunals echo the language of the unclean hands doctrine, which has been used to find that a claimant's claims are inadmissible.[780] As one commentator put it, "[f]raud is the antithesis of good faith and indeed of law, and it would be self-contradictory to admit that the effects of fraud could be recognized by law."[781]

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[777] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, June 6, 2012 ("*Inceysa*, Award"), at para. 244 [Exhibit RLA-021].

[778] *InterTrade Holding GmbH v. Czech Republic*, PCA Case No. 2009-12, Final Award, May 29, 2012 ("The Tribunal takes no issue with the general principle of international law that, in order to benefit from investment protection, an investment must be made in good faith. . . . [T]his is a general principle that exists independently of specific language to this effect in the treaty . . . .") [Exhibit RLA-094].

[779] *Khan Resources*, Decision on Jurisdiction at para. 383 [Exhibit RLA-019].

[780] *Hesham Talaat M. Al-Warraq v. Indonesia*, Final Award at paras. 644-48 (dismissing the claim after a finding that the claimant had taken actions "prejudicial to the public interest . . . breached the local laws and put the public interest at risk . . . [which] deprived him[] of the protection afforded by the OIC Agreement. In this regard, the Tribunal is of the view that the doctrine of '*clean hands'* renders the Claimant's claim inadmissible.") [Exhibit CL-0075].

[781] Bin Cheng, GENERAL PRINCIPLES AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 158 [Exhibit RLA-047 *bis*]. *See also id.* at 156 (quoting the Ecuadorian-United States Claims Commission "What right, under these circumstances, has [claimant] or his representatives to call upon the United States to enforce his claim on the Colombian Republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit*. He has violated the laws of our land . . . . A party who asks for redress must present himself with clean hands.") (internal quotations omitted) [Exhibit RLA-047 *bis*].

383. Claimant has little to say in response. Claimant cites to an article that was authored by one of the authors of Claimant's own brief[782] that professes a "difficulty in identifying with precision what a 'lack of good faith might be,' independent of fraud (including deceit and misrepresentation) or other specific violations of host State law . . . ."[783] But Respondent is not asking the Tribunal to define the theoretical reaches of what constitutes bad faith. Instead, Respondent has shown that Claimant acted in the one of the most blatant forms of bad faith, namely "fraud (including deceit and misrepresentation) or other specific violations of host State law," as Llamzon and Sinclair expressly recognized. These actions clearly constitute bad faith and therefore bar Claimant's claims.

384. Claimant's cited article also proves Respondent's points elsewhere in its analysis. For example, it admits that "[t]he impact of proven wrongdoing is often existential to the investor's claim, resulting in a lack of jurisdiction, the inadmissibility of claims, or the avoidance of the investment agreement. *For the investor, the practical result is the same: no effective remedy in investment arbitration.*"[784] It also acknowledges the holdings of the *Hamester*, *Phoenix Action*, and *SAUR* tribunals in requiring an investment to be acquired in good faith in order to receive treaty protection.[785] It certainly provides no evidence that investments acquired in bad faith deserve, or have ever received, the protection of investment treaties.

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[782] *See* Aloysius Llamzon and Anthony C. Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct* in Albert Jan van den Berg (ed), LEGITIMACY: MYTHS, REALITIES CHALLENGES, ICCA Congress Series, Vol. 18 (Kluwer Law International 2015) ("Llamzon and Sinclair, *Investor Wrongdoing in Investment Arbitration*") [Exhibit CL-0171]. Mr. Llamzon is also named as an author on the cover of Claimant's Reply submission.

[783] Llamzon and Sinclair, *Investor Wrongdoing in Investment Arbitration* at 455 [Exhibit CL-0171].

[784] Llamzon and Sinclair, *Investor Wrongdoing in Investment Arbitration* at 451 (emphasis added) [Exhibit CL-0171].

[785] Llamzon and Sinclair, *Investor Wrongdoing in Investment Arbitration* at 452-53 [Exhibit CL-0171].

385. Claimant also seeks to limit the broad holding of the *Inceysa* tribunal, discussed above, because that tribunal ruled, in Claimant's words, on the basis of the parties' "unequivocally demonstrated . . . intent to limit their consent to arbitration only to investments made" legally.[786] While it is true that the tribunal embarked on a review of the *travaux préparatoires* of the BIT, the tribunal then concluded that "the Agreement does not contain substantive rules that permit a determination whether Inceysa's investment was made in accordance with the law of El Salvador."[787] Therefore the tribunal reviewed "other legal instruments to decide this issue," during which it conducted an extensive review of the international law principle of good faith, and other, similar widely-accepted doctrines.[788] It was amidst this review of international principles that the *Inceysa* tribunal declared that "[g]ood faith is a supreme principle, which governs legal relations in all of their aspects and content . . . good faith means absence of deceit and artifice during the [events] that gave rise to the investment . . . ."[789] In other words, although *Inceysa* began with a textual analysis, it expanded to review general rules of international law that applied in that proceeding and that undoubtedly apply here. Claimant therefore cannot simply ignore the conclusion of the *Inceysa* tribunal that:

> the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it

[786] Claimant's Reply at para. 220.

[787] *Inceysa*, Award at para. 223 [Exhibit RLA-021].

[788] *Inceysa*, Award at paras. 223-24 [Exhibit RLA-021]. *See also id.* at paras. 225-57 (reviewing the international law doctrines of good faith, *nemo auditur propiam turpitudinem allegans*, and international public policy, and finding that the claimant violated all three thereby invalidating its right to seek protection of its investment) [Exhibit RLA-021].

[789] *Inceysa*, Award at paras. 230-31 [Exhibit RLA-021].

> is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud" . . . .[790]

386. Finally, Claimant quotes an extensive portion of the *Saba Fakes* tribunal opinion.[791] But that quotation discusses only whether principles of good faith and legality can be read into Article 25(1) of the ICSID Convention (Jurisdiction of the Centre),[792] and therefore cannot speak to the general international law requirement—as read into investment and free trade treaties—that investments made in bad faith cannot receive protection in an international forum.

387. Claimant cannot point to a single case where a tribunal has found that an investor acquired its investment illegally or through bad faith, and nevertheless found for that investor on the merits. This Tribunal should not be the first to do so—if Claimant is found to have acquired the Santa Ana concessions illegally (as it did), then its claims must be dismissed. Whether they are dismissed for lack of jurisdiction or on grounds of inadmissibility would matter little in the final analysis, so long as Claimant's circumvention of Perú's Constitution is not rewarded with this Tribunal's and the Treaty's protection.

B. CLAIMANT OBTAINED THE SANTA ANA CONCESSIONS ILLEGALLY AND IN BAD FAITH, AND THEREFORE CLAIMANT HAS NO RIGHT TO THE PROTECTIONS CONTAINED IN THE PERÚ-CANADA FTA

388. It is clear from the facts of this case that Claimant sought from the outset to avoid Article 71's constitutional restriction on foreign property ownership in the border region—at least until the Project was more advanced.[793] Whether Claimant was motivated to rush the Santa

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[790] *Inceysa*, Award at para. 242 [Exhibit RLA-021].

[791] *See* Claimant's Reply at para. 229.

[792] The text of Article 25(1) reads: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

[793] *See supra* at Section II.B.2.

Ana Project through the exploration phase in order to make the Santa Ana Project more appealing to a potential senior mining company acquirer, or whether Claimant sought to accelerate the process in hopes of more rapidly financing its larger Corani Project, it clearly viewed waiting for the constitutionally prescribed process to unfold to be unacceptable.

389. As discussed in Section II.B.3 above, Claimant could have acquired the concessions properly through a legal and transparent process that has been followed by many other foreign mining companies: Apply for the concessions directly in its own name, and then submit its public necessity request for the concessions, which would have paused the concession application until either Claimant obtained the public necessity decree or affirmatively abandoned its claim to the concessions.[794] In doing so, Claimant would have maintained its priority vis-a-vis the concessions, but would have had to wait until the Article 71 Supreme Decree process had completed. But Claimant did not proceed in good faith, electing instead an underhanded method to acquire the concessions indirectly through its Peruvian national employee, Ms. Villavicencio. This scheme violated Article 71 of the Peruvian Constitution.

390. Claimant tries to deny its wrongful conduct in five ways. First, Claimant argues that it was open and transparent in its acquisition of the mining concessions, by registering the option contracts in the national registry, by "fully and transparently" disclosing the option agreements to Respondent, and by including elsewhere in its 200-page public necessity application a 1-page public registry entry recording Ms. Villavicencio's role as Claimant's legal representative.[795] The defects of this "disclosure" argument have already been discussed in Section II.B.4 above. The most revealing feature—which was crucial to Claimant's acquisition scheme—is the full extent of Claimant's prior relationship with Ms. Villavicencio. By

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[794] *See supra* at paras. 77-82; Rodríguez-Mariátegui Second Report at paras. 26-31 [Exhibit REX-009].

[795] Claimant's Reply at paras. 194-95.

Claimant's own admission, Claimant approached Ms. Villavicencio with a proposition whereby she would apply for the mining concessions in her own name, and then enter into an agreement with Claimant to sell the rights once Claimant received its Supreme Decree.[796] In effect, Claimant has told the Tribunal plainly that the plan from the beginning was for Ms. Villavicencio to act as a front to hold the concessions for Claimant.[797] Claimant has steadfastly refused to put forward any witness who can testify first-hand to those discussions, such as Ms. Villavicencio herself. It is uncontested that neither Claimant nor Ms. Villavicencio disclosed those planning discussions to Respondent at any point during the acquisition process.

391. Second, Bear Creek argues that the option contracts did not violate Peruvian law and therefore Claimant committed no wrong.[798] Although an option contract, as a general legal instrument, is a useful and legal tool in Perú,[799] that is not the case when, as Dr. Eguiguren explains, the parties use the option contract in a transaction that is not arms-length as one part of a broader scheme to indirectly secure a concession in a restricted border zone.[800] Respondent's experts Dr. Eguiguren[801] and Dr. Danos[802] each confirm that the option contracts are evidence of the broader, illegal scheme to violate Article 71. Dr. Rodríguez-Mariátegui confirms that option contracts used *in this way* are highly unusual in the Peruvian mining sector.[803]

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[796] *See supra* at paras. 57-60; Swarthout First Witness Statement at para. 18.

[797] *See supra* at paras. 57-60; Swarthout First Witness Statement at para. 18.

[798] *See* Claimant's Reply at 197.

[799] *See* Rodríguez-Mariátegui Second Report at para. 33 [Exhibit REX-009].

[800] *See* Eguiguren Second Report at paras. 44-45 [Exhibit REX-007].

[801] *See* Eguiguren Second Report at paras. 50-56 [Exhibit REX-007].

[802] *See* Danos Expert Report at paras. 86-97 [Exhibit REX-006].

[803] *See* Rodríguez-Mariátegui Second Report at paras. 33-34 [Exhibit REX-009].

392. Third, Claimant argues that the SUNARP Registry Tribunal confirmed the legality of the option agreements.[804] As discussed in Section II.B.4 above, however, the SUNARP Registry Tribunal only has the authority to publicly register documents that meet certain technical requirements; it cannot create or affirm substantive rights.[805]

393. Fourth, Claimant has noted all of four examples of what it calls "similar structures" of investment by other foreign mining companies in the border region that Respondent has approved.[806] These four examples, in Claimant's view, confirm the legality of its own acquisition. However, as Respondent discussed above in Section II.B.3, none of these examples are comparable to the scheme that Claimant instituted whereby it recruited an employee to acquire the concessions for Claimant while it waited for a public necessity decree.[807] Moreover, the Government's inaction in another case does not grant any legality to Claimant's own actions in this case, which must be analyzed on their own merits.[808]

394. Finally, Claimant argues that it was not the legal owner of the Santa Ana concessions until it acquired the public necessity decree and exercised its option to purchase the concessions, and that it did not exercise *de facto* or indirect control before that time.[809] Claimant contends that the option agreements did not transfer title to the concessions, and, in fact, expressly provided that Bear Creek could only acquire the concessions after it obtained the declaration of public necessity.[810] Again, Claimant misses the forest for the trees. By Claimant's own admission, Ms. Villavicencio only acquired the rights because she was asked to

[804] *See* Claimant's Reply at para. 198.

[805] *Supra* at paras. 106-108; Rodríguez-Mariátegui Second Report at paras. 33-40 [Exhibit REX-009].

[806] Claimant's Reply at 195.

[807] *See supra* at para. 83-98.

[808] *See supra* at paras. 99; Rodríguez-Mariátegui Second Report at para. 57 [Exhibit REX-009].

[809] *See* Claimant's Reply at 199.

[810] *See* Claimant's Reply at 199.

do so by Claimant—the acquisition scheme was hatched entirely by Claimant.[811] Before Ms. Villavicencio had even received the concessions for which she had applied, Claimant entered into an agreement with her—which was part of the initial arrangement—to sell those concessions once Claimant received the public necessity decree.[812] Without benefit of Government permission, Claimant conducted exploration activities on the concessions using Ms. Villavicencio's name in applications to the Government.[813] Unfortunately, Claimant has failed to provide testimony from Ms. Villavicencio that could have helped to clarify her role and involvement at each stage of this process. Common sense dictates that she had no role whatsoever.

395. In a related point, Claimant argues that its scheme was not unlawful because it "[a]ct[ed] on counsel's advice" to condition the option agreements that it entered into with Ms. Villavicencio on the future public necessity decree.[814] But, as discussed in Section II.B.4 above, regardless of how "preeminent" the counsel that Claimant consulted,[815] acting on supposed advice of counsel is not a legitimate excuse for violating the Constitution; counsel can be wrong. Moreover, even though Claimant has clearly waived the attorney-client privilege, it is notable that it has *not* provided evidence of either the facts that Claimant provided to its counsel soliciting the legal advice, or any document evidencing the advice itself. The Tribunal is left

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[811] *See* Swarthout First Witness Statement at para. 18.

[812] *See supra* at paras. 56-60 (discussing the fact that Ms. Villavicencio signed the option agreements with Claimant in 2004, but did not receive the concession rights themselves until 2006 and 2007).

[813] *See supra* at paras. 64-65 (discussing Claimant's 2006 exploration campaign "on behalf and for the benefit of—and in coordination with—Ms. Villavicencio," just months after Ms. Villavicencio received the concessions but approximately one year before she would transfer them to Claimant).

[814] Claimant's Reply at para. 194.

[815] Claimant failed to explain up front in this arbitration that the managing partner at the time of the firm that it consulted also sits on Claimant's own Board of Directors. *See supra* at paras. 58,114.

only with Claimant's own convenient testimony to confirm that Claimant's acquisition scheme was blessed by its Peruvian lawyers.

396. According to the facts on the record, it is abundantly clear that Claimant, and not Ms. Villavicencio, exercised ownership of the concessions without the public necessity decree and without informing the Government. Claimant drove the development of the Santa Ana concessions from the beginning, years before it received or even applied for the public necessity decree that was required under the Peruvian Constitution. Ms. Villavicencio, the temporary, nominal owner of the concessions, was merely a shell acquirer that Claimant used to circumvent Article 71.

397. Claimant withheld the details of its relationship with Ms. Villavicencio from the Government, and therefore failed to act in good faith. Claimant's so-called "disclosures" were incidental or perhaps even accidental. Claimant therefore deprived Respondent of the ability to implement its own Constitution. The Tribunal should recognize that Claimant acted in bad faith.

C. CONCLUSION ON UNLAWFUL AND BAD FAITH INVESTMENTS

398. The Tribunal must dismiss Claimant's case without reaching the merits because Claimant cannot demonstrate that it legally and in good faith acquired the Santa Ana concessions that are the foundation of its claimed investments. Tribunals differ on whether the legality and good faith requirements deprives an ICSID tribunal of jurisdiction, because the host State cannot be said to have consented to arbitration of disputes involving investments that were obtained illegally, or if instead the requirement makes any claims with regard to that investment inadmissible. One thing is clear, however: Claimant, on account of its illegal acts and bad faith, is not entitled to the substantive protections of the Perú-Canada FTA, and cannot proceed to a determination on the merits.

D. RESPONDENT IS NOT ESTOPPED FROM ASSERTING IN THESE PROCEEDINGS THAT CLAIMANT OBTAINED THE SANTA ANA CONCESSIONS UNLAWFULLY

399. Claimant argues that Respondent is estopped from arguing in this arbitration that Claimant illegally obtained the Santa Ana investment because, according to Claimant, Respondent knew of the manner in which Claimant acquired the mining concessions, approved the investment through Supreme Decree No. 83, and did not attempt to rectify the violation of Article 71 until years later.[816] Claimant's invocation of estoppel should be seen for what it is: Claimant's attempt to dress up its factual arguments regarding the Santa Ana acquisition using the veneer of an international law doctrine.[817]

400. As noted just above and in Sections II.B and II.F.2, Claimant's acquisition of Santa Ana was illegal, and the relevant Government officials did not know of that fact until 2011.[818] Upon uncovering the illegal scheme, Respondent promptly revoked the public necessity declaration that it had granted to Claimant, and also sought to rectify the newly discovered illegality through a civil proceeding to undo the transaction between Claimant and its employee-turned-acquisition vehicle, Ms. Villavicencio. These facts render Claimant's entire estoppel argument moot—Respondent could not have taken a position on Claimant's acquisition without knowledge of the aspects that made it illegal. They also make it clear that Respondent is not taking two contradictory positions, another requirement of an estoppel defense. Now that it does

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[816] *See* Claimant's Reply at paras. 201-11.

[817] Claimant also attempts to shroud its argument in the international public policy principle of *allegans contraria non audiendus est* (roughly translated from the Latin "to he who alleges to the contrary shall not be heard"). *See* Claimant's Reply at para. 204. Claimant has not explained how this principle differs from the international law doctrine of estoppel and, indeed, some commentators have equated the two. *See, e.g.* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141-42 ("whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted.") (internal quotations omitted) [Exhibit RLA-047 *bis*]. Respondent therefore has not treated this principle separately from its discussion of the doctrine of estoppel that follows.

[818] *See supra* at paras. 56-55, 287. *See also* Gala Second Witness Statement at para. 22 [Exhibit RWS-005]; Zegarra Second Witness Statement at paras. 18-22 [Exhibit RWS-007]; Fernández Witness Statement at paras. 24-25, 28 [Exhibit RWS-004].

know of Claimant's scheme, Respondent has taken the same position in Supreme Decree No. 032 and in its domestic courts that it takes now in this arbitration: that Claimant's surreptitious, *de facto* acquisition of the Santa Ana concessions violated Article 71 of the Peruvian Constitution.

1. Respondent Became Aware of Claimant's Illegal Scheme Only in 2011 and Claimant Has Not Established Any of the Elements of Estoppel

401. Nowhere in Claimant's discussion of the estoppel principle under international law does Claimant articulate or point to a specific test or series of elements that must be met to estop a party from making factual or legal arguments in an international arbitration. Instead, Claimant references a separate opinion in the *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, and argues that Respondent "is bound by its previous acts or attitude when they are in contradiction with its claims in the" international arbitration.[819] But, as the next sentence of the separate opinion explains, "enunciated in these broad terms, the soundness and justice of the rule is generally accepted. However, it is manifest that wide divergences exist as to its meaning, its character, its scope and even its denomination."[820] The details and implementation of the estoppel rule, which Claimant ignored, are most crucial.

402. Although the doctrine of estoppel is fairly established in international law, it is not commonly invoked. Brownlie noted the similarities between the estoppel doctrine and the presumption that parties have acted in good faith, suggesting that estoppel also requires a high

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[819] Claimant's Reply at para. 202 (internal quotations omitted) (quoting *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award, Separate Opinion of Vice-President Alfaro, 1968 ("*Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award, Separate Opinion of Vice-President Alfaro"), at p. 39 [Exhibit CL-0158]).

[820] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award, Separate Opinion of Vice-President Alfaro at p. 39 [Exhibit CL-0158].

bar.[821] In fact, it is evident from the international jurisprudence that estoppel, which effectively holds that "a State is held to have abandoned its right,"[822] requires exceptional circumstances. The *Chevron v. Ecuador* tribunal found that "estoppel and waiver are subject to a high threshold . . . . It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim."[823] No such "very exceptional circumstances" exist here where, as described above, Respondent's position is consistent and has been ever since it gained knowledge that Claimant had deliberately circumvented the restrictions of Perú's Constitution.

403. The tribunal in *Pan American Energy LLV v. Argentine Republic* explained that "the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party."[824] The tribunal further adopted the three necessary conditions that the ICJ identified in the *Temple of Preah Vihear* case, namely "(i) a clear statement of fact by one party which (ii) is voluntary, unconditional and authorized; and (iii) reliance in good faith

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[821] I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 638 (3d ed. 1979) ("A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency . . . . " (footnote omitted)) [Exhibit RLA-090].

[822] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award, Separate Opinion of Vice-President Alfaro at p. 39 [Exhibit CL-0158]. *See also Chevron Corp. (U.S.A.) and Texaco Petroleum Corp. (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Interim Award, December 1, 2008 ("*Chevron Corp.*, Interim Award"), at para. 137 (Estoppel has "the effect that a right which existed at a certain time can no longer be relied upon or enforced by the holder of that right.") [Exhibit RLA-093].

[823] *Chevron Corp.*, Interim Award at para. 143 [Exhibit RLA-093]. *See also Mamidoil*, Award at para. 470 (rejecting the claimant's argument that respondent is estopped to claim that the investment was illegal because "the required exceptional circumstances are absent in the relations between the Parties in this case") [Exhibit RLA-017]. It is notable that Claimant, in attempting to support the principle that estoppel is an established international law doctrine, referenced the respondent's argument in the case, rather than the tribunal's ultimate holding, perhaps to divert the Tribunal's attention from this expression of an elevated standard. *See* Claimant's Reply at fn. 529 (citing to *Mamidoil*, Award at paras. 315-16 [Exhibit RLA-017]).

[824] *Pan American Energy LLV v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006 ("*Pan American Energy*, Decision on Preliminary Objections"), at para. 159 [Exhibit CL-0165].

by another party on that statement to that party's detriment or to the advantage of the first party."[825] Claimant cannot meet any of these three factors.

a. Respondent made no "clear statement of fact" that endorsed Claimant's illegal scheme to acquire the Santa Ana concessions indirectly through control of its employee

404. The first prong requires Respondent to make a "clear statement of fact." Tribunals have required that the clear statement must be precise. In the words of the *Chevron v. Ecuador* tribunal, "the representation on which the estoppel is based must be clear and unequivocal."[826] For example, in *Mamidoil*, the tribunal did not find sufficiently clear or precise a public statement by the Prime Minister admitting to the legality of certain investment contracts and the State's need to acknowledge "the legal and financial responsibility, regarding the obligation arising to the Albanian state" under those contracts, as a sufficient admission that the project had received subsequent construction and other permits legally.[827]

405. Claimant points to a series of alleged statements that it claims constitute an endorsement of Claimant's acquisition scheme. But it is clear that, even assuming the statements were actually made, none of them expressly analyzed *all* of the facts of the acquisition scheme and none reached a definitive conclusion as to its legality. None provides the "clear and unequivocal" statement that Claimant needs to estop Respondent from defending itself from

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[825] *Pan American Energy*, Decision on Preliminary Objections at para. 151 (setting out the three part test that the tribunal later adopted in para. 160) [Exhibit CL-0165].

[826] *Chevron Corp. and Texaco Petroleum Co. v. Republic of Ecuador*, PCA Case No. AA27, Partial Award on the Merits, March 30, 2010 ("*Chevron,* Partial Award") at para. 351 (internal quotations omitted) [Exhibit CL-0166]. *See also Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award, Separate Opinion of Vice-President Alfaro at p. 40: ("The acts or attitude of a State previous to and in relation with rights in dispute with another State may take the form of a written agreement, declaration, express representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation.") [Exhibit CL-0158].

[827] *Mamidoil*, Award at para. 474 [Exhibit RLA-017]. *See also Chevron*, Partial Award on the Merits at paras. 348-53 (finding that claimant's previous statements affirming the reliability of respondent's judicial system did not bar claims made in the arbitration against the fairness of the respondent's courts) [Exhibit CL-0166].

Claimant's misguided claims in this arbitration. Indeed, as described above, Respondent could not unequivocally affirm the acquisition because it did not know some parts of the illegal scheme until 2011, and others until this arbitration began. Claimant's argument boils down to an argument that Respondent *constructively* knew of the acquisition scheme (because it had access to several documents which, if scavenged from Claimant's papers and put together like a connect-the-dot puzzle begin to outline the illicit scheme) and yet it failed to act. Respondent's alleged silent consent to the acquisition cannot possibly amount to the "unequivocal" and "clear statement of fact" that is required for the estoppel doctrine.

406. First, Claimant alleges that Supreme Decree No. 83 itself expressly approved Claimant's acquisition of the Santa Ana concessions.[828] But, as Respondent has already explained,[829] Claimant did not reveal in its application for Supreme Decree No. 83 that Ms. Villavicencio was Claimant's employee (and therefore easily manipulated or beholden to a request from her employer), or that Ms. Villavicencio only applied for the concessions because Claimant asked her to do so, or that Claimant intended to conduct exploration activities only nominally "on behalf and for the benefit of" Ms. Villavicencio.[830]

407. In other words, when Respondent issued Supreme Decree No. 83, it did not know that Claimant had used Ms. Villavicencio as a vehicle through which it exercised indirect and *de facto* control surreptitiously over the concessions well before the Supreme Decree was issued. Nor does Supreme Decree No. 83 contain any express language that could be construed as endorsing any of these facets of Claimant's acquisition scheme; it simply authorizes Claimant "to acquire seven (7) mineral rights located in the department of Puno in the border zone with

[828] Claimant's Reply at paras. 198, 207-09.

[829] *See supra* at paras. 68 *et seq*.

[830] Swarthout Second Witness Statement at para. 22.

Bolivia."[831] The Supreme Decree therefore cannot be a "clear statement of fact" that confirmed the legality of this operation.

408. Second, Claimant alleges that the SUNARP Registry Tribunal decision upholding the option agreements that Claimant entered into with its employee Ms. Villavicencio constitutes approval of the acquisition mechanism.[832] As Dr. Rodríguez-Mariátegui confirms, however, the SUNARP Tribunal only reviews documents for the limited requirements necessary to register them.[833] It does not review information outside of the four corners of the document to be registered, and it cannot, by law, create or affirm rights contained in those documents.[834] It has a function of providing notice and nothing more. The SUNARP Registry Tribunal cannot be said to be a definitive statement from Respondent affirming the legality of Claimant's acquisition scheme, which it did not review and which it has no authority to address.

409. Third, Claimant references a DGAAM order in June 2006,[835] that, in Claimant's words, "requested that Ms. Villavicencio amend the format of the land use agreement to reflect clearly that she was the counter-party."[836] This is highly misleading. Ms. Villavicencio had submitted with her sworn affidavit seeking exploration rights a land use agreement between *Claimant* and a local community that gave *Claimant* the right to use the land for exploration purposes. The DGAAM informed the formal concession-holder (Ms. Villavicencio) that *she* needed to acquire the necessary permission to conduct the exploration activities, as only a

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[831] Supreme Decree No. 083-2007-EM at Art. 2 [Exhibit C-0004].

[832] Claimant's Reply at paras. 198, 207.

[833] Rodríguez-Mariátegui Second Report at para. 36 [REX-009].

[834] Rodríguez-Mariátegui Second Report at para. 37 [REX-009].

[835] The order was issued after Ms. Villavicencio filed her sworn affidavit to support the beginning of the exploration of the Santa Ana concessions, which she had recently acquired. *See* Rodríguez-Mariátegui Second Report at paras. 65-66 [Exhibit REX-009]. Ms. Villavicencio was required to resolve the issues identified in the order so that she could begin exploring the concessions. Of course, it is now understood that Claimant, and not Ms. Villavicencio, conducted those exploration activities, allegedly on her behalf.

[836] Claimant's Reply at para. 207.

concession-holder can take actions with respect to mineral resources. The DGAAM order therefore required that she "should promise to obtain or formalize the acquisition of the superficial land use authorization before initiating the exploration activities."[837]

410. This document cannot possibly comprise an approval, or even knowledge, of the acquisition scheme. It clearly reflects Respondent's (in effect, mistaken) belief at the time that Ms. Villavicencio, not Claimant, was the titleholder of the concessions. The document refers to Claimant as a "third party"[838] and does not acknowledge *any* relationship between Claimant and Ms. Villavicencio. Indeed, the DGAAM would have had no reason to connect the two. When the DGAAM issued this order, Claimant had not yet applied for the public necessity declaration, and so, it had not even revealed that it planned to acquire the concessions. This document is not a clear and unequivocal statement approving Claimant's illegal acquisition of the concessions.

411. Finally, Claimant implies that, given the alleged knowledge that Respondent had of the details of the acquisition by Claimant, Respondent affirmed the legality of that acquisition by acquiescing to Claimant's operations.[839] Of course, silence cannot possibly constitute a "clear statement of fact." And silence is especially meaningless if Respondent was unaware of the basis of any possible reason to speak up. As the tribunal in the first *Fraport v. Philippines* case noted:[840]

> But a covert arrangement, which by its nature is unknown to the government officials who may have given approbation to the project, cannot be any basis for estoppel: the covert character of the arrangement would deprive any legal validity (assuming that informal and possibly *contra legem* endorsements would have

[837] Report No. 157-2006/MEM-AAM/EA, June 22, 2006, at p. 5 [Exhibit C-0139].

[838] Report No. 157-2006/MEM-AAM/EA, June 22, 2006, at p. 5 [Exhibit C-0139].

[839] *See generally* Claimant's Reply at paras. 192-211.

[840] *Fraport I*, Award at para. 347 [Exhibit RLA-091]. *See also id.* ("There is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment in 1999.").

> legal validity under the relevant law) that an expression of approbation or an endorsement might otherwise have had.

412. Moreover, at least one tribunal has confirmed the logical premise that "[m]ere inactivity, as opposed to an act, is not enough" to constitute a definitive statement for the purpose of estoppel.[841] But, even assuming that acquiescence could be inferred from silence, it must be apparent precisely what that silence was intended to convey. ICJ Vice President Alfaro, in a concurring opinion in the *Temple of Preah Vihear* case, stated that estoppel "by a passive or negative attitude" may occur for "[f]ailure of a State to assert its right when that right is openly challenged . . . ."[842]

413. There is no evidence on the record that Respondent was ever "openly challenged" with evidence of Claimant's illegal scheme to acquire the concessions through its employee. At most, Claimant has compiled a series of data points that were available to different Government entities at different moments, and *constructed* a claim of "Respondent's" knowledge from the sum of them. In Claimant's view, Respondent should have connected the dots that were available, even though they were never presented together in a coherent fashion to the same actors at the same time. This is an unreasonable imposition on Respondent and cannot pass for the "extreme circumstances" required to deny Respondent a legitimate right to defend itself in this arbitration. The fact that Respondent did not act against Claimant's violation of the Constitution at any point in time prior to Supreme Decree No. 32 cannot imply Respondent's approval.[843]

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[841] *Mamidoil*, Award at para. 469 [Exhibit RLA-017].

[842] *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Award, Separate Opinion of Vice-President Alfaro at p. 30 [Exhibit CL-0158].

[843] Dr. Rodríguez-Mariátegui further notes that, under Peruvian law, failure to sanction an act in one case does not create a legal norm that approves of that act in subsequent cases. In other words, even if Claimant had shown that other foreign companies allegedly acquired mining concessions in the border region through a similar arrangement

414. The insufficiency of any of these supposed "statements" by Respondent is clear from contrasting any of them to the "statements" invoked against the states in *ADF v. Hungary*[844] and in *Kardassopolos v. Georgia.*[845] In both cases the State, either on its own (Hungary) or through a state-owned entity (Georgia), entered into a contract with the claimant and then argued during the arbitration that the same contract was unenforceable. The respondent in each case contested the *attribution* of the statements in the contract, rather than, as Respondent does here, whether any such statement affirming a position was made at all. That is because a written contract is a clear and unequivocal statement of a party's factual and legal position, unlike any of Respondent's statements that Claimant has put forward in this arbitration. Claimant has produced no clear and unequivocal statement that Respondent is contradicting in this arbitration that would give rise to the estoppel doctrine.

b. Even if Respondent could be found to have made a "clear statement of fact" the alleged statements were not "voluntary, unconditional and authorized"

415. Even assuming that one of the above statements constitutes a "clear statement of fact," none could be considered "voluntary, unconditional and authorized." For example, the SUNARP Registry Tribunal, as discussed above, cannot create substantive rights under Peruvian law, and therefore its decision could be considered an authorized statement of the Government's position on the legality of the option agreements in this case. As another example, Supreme

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to the one that Claimant employed, that could not be considered an authoritative interpretation of law in Perú. *See* Rodríguez-Mariátegui Second Report at para. 57 [Exhibit REX-009].

[844] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006, at para. 145 ("Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements.") [Exhibit CL-0060].

[845] *See Ioannis Kardassopolos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, at paras. 185-92 (recounting the statements contained in the agreements between the state-owned entities and the claimant that affirm that the agreements themselves are valid and enforceable and finding that the statements of the state-owned entities bind the State for purposes of the arbitration) [Exhibit RLA-092].

Decree No. 083 cannot be considered unconditional because it is a discretionary decision that can be revoked should the conditions change that led to its issuance. Claimant admits that the public necessity declaration that formed the crux of Supreme Decree No. 83 could be taken away in the event that Claimant's presence in the border region threatened national security.[846] These therefore cannot be considered authorized or unconditional.

416. Likewise, Respondent's so-called acquiescence (silence) cannot be called voluntary, unconditional, and authorized. Because Respondent did not have full knowledge of the arrangement that Claimant entered into with its employee Ms. Villavicencio, it cannot be said that Respondent had the opportunity to voluntarily provide its confirmation of the arrangement. Nor has Claimant put forward *any* evidence that any level of Respondent's decision-makers specifically authorized a decision to not investigate and/or prosecute Claimant for violating Article 71 of the Constitution. Respondent's witnesses confirm that they had no knowledge of the scheme,[847] and therefore they could not have authorized a decision not to sanction Claimant's constitutional violation. Claimant therefore cannot meet this second prong.

c. Claimant could not have relied in good faith on an acquisition scheme that it should have known violated the Constitution

417. Finally, Claimant cannot claim that it relied on the legality of its acquisition scheme in good faith, given that it failed to disclose to Respondent the full details through which it acquired the investment. This final prong requires "detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party

[846] *See* Claimant's Reply at para. 252. Although Claimant improperly limited the term to only external threats, national security in Perú consists of both external threats and internal disorder. *See* Eguiguren Second Report at para. 31 [Exhibit REX-007].

[847] *See* Gala Second Witness Statement at para. 22 [Exhibit RWS-005]; Zegarra Second Witness Statement at paras. 18-22 [Exhibit RWS-007]; Fernández Witness Statement at paras. 24-25, 28 [Exhibit RWS-004].

would cause serious injustice to the first party."[848] Crucially, such reliance must be "legitimate[]."[849]

418. Claimant's alleged reliance on Respondent's acquiescence to its investment up until 2011, could not be legitimate because Claimant knew that any alleged acquiescence was not based on full knowledge of the factual circumstances. Claimant is fond of noting that it disclosed to Respondent in its public necessity application the option contracts with Ms. Villavicencio and a document illustrating that she had a relationship with Claimant as a legal representative.[850] This does not, however, constitute the transparency that Claimant alleges. Claimant did not, for example, disclose to Respondent that Ms. Villavicencio was Claimant's employee, which is a different and more dependent relationship than that of an independent legal representative. Nor did Ms. Villavicencio disclose to Respondent when she applied for the concessions that she was acquiring them at the specific request of a foreign company, and that she had already planned to sign away her rights to those concessions before she ever received them. Instead, Claimant knowingly withheld that information and put on a puppet show in which Ms. Villavicencio nominally applied for permits to explore the concessions, even though there is no evidence on the record that she directed or played any role in the way that those exploration activities were conducted.

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[848] *Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Order of the Consolidation Tribunal, September 7, 2005, at para. 168 [Exhibit CL-0164].

[849] *Mamidoil*, Award at para. 469 ("Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct.") [Exhibit RLA-017]. *See also Chevron*, Partial Award at para. 351 (To find estoppel "there must be actual, justified reliance by the other party.") [Exhibit CL-0166].

[850] *See, e.g.* Claimant's Reply at para. 195 ("Claimant fully and transparently disclosed the Option Agreements to the Peruvian Government, including Ms. Villavicencio's role as a legal representative for banking matters.").

419. Claimant therefore has not met any of the elements of estoppel under international law principles. The doctrine cannot be used to prevent Respondent from arguing that Claimant acquired its investment illegally, and that, therefore, this Tribunal should not hear its claims..

2. Claimant's Appeal to Peruvian Law Is Irrelevant

420. Claimant invokes Peruvian law as a ground to prevent Respondent from arguing in this arbitration that Claimant violated Article 71 to acquire the Santa Ana concessions.[851] That argument is entirely irrelevant; Peruvian procedural law does not apply in this proceeding and, as described above, Claimant has not proven the elements of the international law estoppel doctrine. Claimant provides no support for its proposition that Peruvian procedural law should apply in an international arbitration. And, even if the Peruvian doctrine were somehow applicable in this case, Respondent's experts Dr. Danos[852] and Dr. Eguiguren[853] each explain that it would not apply here, where Claimant circumvented the Constitution to acquire concessions indirectly through subterfuge. As Dr. Danos explains, Respondent had the right under Peruvian law to revise the public necessity decree contained in Supreme Decree No. 83 once it learned of Claimant's illegal acts.[854]

E. CLAIMANT'S VIOLATIONS OF PERUVIAN LAW INVALIDATE ITS CLAIMED INVESTMENT AT SANTA ANA

421. As Respondent explained in its Counter-Memorial,[855] even if the Tribunal determines that it has jurisdiction over unlawful and bad-faith investments, Claimant's claimed investment is *invalid* under Peruvian law, which in turn means that this Tribunal lacks

[851] Claimant's Reply at paras. 205-06.

[852] *See* Danos Expert Report at paras. 110-11 [Exhibit REX-006].

[853] *See* Eguiguren Second Report at paras. 59-63 [Exhibit REX-007].

[854] *See* Danos Expert Report at para. 111 [Exhibit REX-006].

[855] Respondent's Counter-Memorial at para. 215.

jurisdiction because there is no investment on which to base the Treaty claims. Under Peruvian law, concessions obtained in violation of Article 71 of the Constitution (*i.e.* without first obtaining a public necessity declaration from the Council of Ministers)—such as Claimant's "investment" at Santa Ana—revert to the State.[856] Bear Creek's scheme is presently being examined in a domestic court in Perú in a proceeding that could result in Claimant being stripped of its concession rights entirely, as Article 71 itself requires.[857] In that event, it will be confirmed as a matter of Peruvian law that Claimant never lawfully possessed the investment from which its claims supposedly arise.

422. However, as Respondent explained, the Tribunal need not wait for a decision from the Peruvian judiciary: it may, and should, determine for itself that the Santa Ana acquisition violated Peruvian law.[858] It would follow then, that no investment—and no jurisdiction—would exist in this case.

423. Claimant made no attempt to respond to this argument in its Reply. Therefore, Claimant (at least implicitly) agrees that the Tribunal is empowered to rule on the legality of the Santa Ana investment as a matter of Peruvian law, and to decline jurisdiction on the basis of that finding.

F. THE TRIBUNAL LACKS JURISDICTION BECAUSE CLAIMANT DOES NOT OWN THE INVESTMENTS UPON WHICH IT BASES ITS CLAIM

424. In its Counter-Memorial, Respondent also explained that even if the Tribunal somehow determines that Claimant lawfully obtained *some* set of rights at Santa Ana, Claimant never acquired the right to operate a "mining project" or a "right to mine," upon which it bases

[856] *See infra* at para. 90.

[857] Respondent's Counter-Memorial at para. 215.

[858] Respondent's Counter-Memorial at para. 216.

its claims of Treaty breach.[859] Claimant cannot sustain legal claims on the basis of injuries to rights that it never acquired, and thus, the Tribunal lacks jurisdiction to hear its case.[860] In its Counter-Memorial, Respondent cited *Gallo v. Canada*, which noted that:

> [i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."[861]

425. In this case, Claimant cannot establish that it "owned or controlled" the right to mine at Santa Ana, and thus, the Tribunal cannot assert jurisdiction. At most, it held an exclusive right to *seek* a right to mine and to pursue a mining project.

426. Claimant's response is perplexing. Based on strained readings of Peruvian law, Claimant concludes that its mere acquisition of the Santa Ana concessions somehow bestowed upon it the rights to both "explore and exploit mineral resources" and "use and enjoy … products that are extracted."[862]

427. This simply cannot be. Claimant's obligation to apply for and obtain a host of permits and approvals before "exploiting" and "extracting" silver at Santa Ana is not seriously in dispute. As such, Claimant's assertion that its ownership of the concessions somehow grants it those very same rights cannot be correct. It follows that Claimant's failure to establish that it held the rights upon which it bases its claim persists. That failure is fatal to jurisdiction.

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[859] Respondent's Counter-Memorial at para. 217. *See also* Claimant's Memorial at pp. iv, vi, 12, 15, 23 and para. 1 (referencing the Santa Ana "Mining" project).

[860] Respondent's Counter-Memorial at para. 217.

[861] *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, September 15, 2011, at para. 328 [Exhibit RLA-025]; *see also Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014, at paras. 171-173 [Exhibit RLA-026].

[862] Claimant's Reply at paras. 237, 322-24.

IV. PERÚ DID NOT BREACH THE FTA

A. SUPREME DECREE NO. 032 DID NOT EXPROPRIATE CLAIMANT'S INVESTMENT IN THE SANTA ANA CONCESSION

428. As explained in Respondent's Counter-Memorial,[863] Supreme Decree No. 032 was not expropriatory, because it was a proper exercise of Perú's police powers that Respondent undertook to protect its citizens and to safeguard its constitutional and regulatory regime for natural resources. Claimant's repeated attempts to cast aspersions upon Respondent's motives are unconvincing. As such, and in deference to Perú's sovereign regulatory choices, the Tribunal must recognize and give effect to the police powers exception.

429. But even if the Tribunal were to find that the police powers doctrine does not apply, Claimant's expropriation claim would fail nonetheless. Despite its best efforts, Claimant cannot cast Supreme Decree No. 032 as a direct expropriation, because the decree did not revoke or cancel Claimant's concession rights.[864] As such, Claimant's only plausible claim is for indirect expropriation. Unfortunately for Claimant, the FTA recognizes indirect expropriation only in "rare circumstances," and Claimant cannot meet this elevated standard. There is nothing "rare" about a sovereign state acting to protect its citizens, and as such, Claimant's expropriation claim must fail.

430. In the Sections below, Respondent explains that: (i) Decree No. 032 was a proper exercise of Respondent's police powers and therefore not expropriatory; (ii) Claimant cannot meet the FTA's elevated burden for proving indirect expropriation; and (iii) even if Claimant

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[863] Respondent's Counter-Memorial, Section IV(A).

[864] Instead, Supreme Decree No. 032 simply revoked the public necessity declaration contained in Supreme Decree No. 083. It did not cancel or seize Bear Creek's titles to the Santa Ana concessions. While MINEM has commenced litigation in Peruvian court to invalidate the transfers of the concessions to Bear Creek, that action is premised on the illegality of Claimant's investment structure—and if it is upheld, then the transfer of the concessions to Claimant will be annulled, *i.e.*, for legal purposes, Claimant will never have made or held an investment, meaning no expropriation can have occurred.

could somehow prove expropriation, its rights at Santa Ana—and thus the scope of any possible expropriation—are very limited.

1. Supreme Decree No. 032 Is a Legitimate Exercise of Respondent's Police Powers

431. Supreme Decree No. 032 is not expropriatory because it is a legitimate exercise of Respondent's sovereign police powers—a foundational tenet of international law that investment treaty jurisprudence has long recognized. Claimant hopes to narrow the police powers doctrine,[865] but its creative arguments cannot remove or restrict Respondent's sovereign right to use its laws to protect its citizens. Supreme Decree No. 032 did just that. Respondent's witnesses establish, and contemporaneous evidence confirms, that Respondent issued Supreme Decree No. 032 to address the causes of increasingly violent protests that threatened the safety of Peruvian citizens and to preserve the integrity of the Perú's constitutional and regulatory regime for natural resources.

432. This Section (a) briefly reviews the robust corpus of police powers jurisprudence; (b) explains that the police powers doctrine applies to both regulations of general application and to measures that enforce generally applicable regulations, like Supreme Decree No. 032; (c) demonstrates that the police powers doctrine affords a margin of appreciation to Perú's regulatory choices; and (d) explains that the police powers doctrine applies here because Respondent, in an exercise of its sovereign discretion to assess public necessity and national security associated with border zone investments, issued Supreme Decree No. 032 to preserve the integrity of Perú's legal regime and to address a serious threat to Perú's citizens.

[865] Claimant's Reply at paras. 291-94 (arguing that "the police powers doctrine is not applicable to Article 812 of the Canada-Perú FTA").

a. <u>The police powers doctrine is a fundamental tenet of international law that applies even in the absence of an express reference in the relevant international instrument</u>

433. In its Counter-Memorial, Respondent described the rich international law pedigree of the police powers doctrine.[866] Respondent noted that as early as 1941, Professor Herz recognized that:

> The right of the state to interfere with private property in the exercise of its police power *has been recognized by general international law* as referring to foreign property also: interference with foreign property in the exercise of police power is not considered expropriation.[867]

434. The Harvard Draft Convention echoed Professor Herz, stating that "[a]n uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results ... from the action of the competent authorities of the State in the maintenance of public order ... shall not be considered wrongful."[868]

435. In its Reply, Claimant argues that the police powers doctrine—a foundational principle of general international law—does not apply here, because the FTA contains "no express carve-out to expropriation for a State's regulatory actions or exercise of police powers...."[869] In making this argument, Claimant fails to appreciate the scope and reach of this longstanding doctrine, which provides an overarching exception for certain exercises of State action, above and beyond any carve-out that might appear in a given treaty.

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[866] *See* Respondent's Counter-Memorial at paras. 227-37.

[867] John H. Herz, *Expropriation of Foreign Property*, 35 AM. J. INT'L L. 243, 251-52 (1941) [Exhibit RLA-032] (emphasis added).

[868] L.B. Sohn & R.R. Baxter, *Responsibility of States for Inuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 515, 554 (1961) [Exhibit RLA-033].

[869] Claimant's Reply at para. 294.

436. International tribunals have repeatedly confirmed that the police powers exception applies whether or not an explicit treaty provision is present. For instance, the *Saluka* tribunal noted that "the Treaty in the present case … does not contain any exception for the exercise of regulatory power," but nonetheless affirmed the applicability of "the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order."[870]

437. In fact, of the seven cases Respondent cited in its Counter-Memorial to establish the very broad acceptance of the police powers doctrine, *none* involved a treaty with an explicit police powers carve-out.[871] Instead, these tribunals recognized and applied the doctrine as a principle of general international law.[872]

[870] *Saluka Investments v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 ("*Saluka*, Partial Award"), at para. 254 [Exhibit CL-0091]. *See also id.* at para. 255 ("It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.") [Exhibit CL-091].

[871] Respondent's Counter-Memorial, n.384, *citing Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002 ("*Methanex*, Partial Award"), pt. IV, ch. D, para. 7 [Exhibit RLA-030]; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002 ("*Feldman*, Award"), at para. 103 [Exhibit RLA-031]; *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001 ("*Lauder*, Final Award"), at para. 198 [Exhibit RLA-028]; *Crompton (Chemtura) Corp. v. Canada*, Award, August 2, 2010 ("*Chemtura*, Award"), at para. 266 [Exhibit CL-0066]; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. Argentine Republic*, UNCITRAL, Decision on Liability, July 30, 2010 ("*Suez*, Decision on Liability"), at para. 128 [Exhibit CL-0102]; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, December 27, 2010 ("*Total S.A.*, Decision on Liability"), at para. 197 [Exhibit CL-0096]; *Fireman's Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award, July 17, 2006 ("*Fireman's Fund*, Award"), at para. 176(j) [Exhibit RLA-029]; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, September 13, 2001 ("*CME v. Czech Republic*"), at para. 603 [Exhibit CL-0103].

[872] *See, e.g.*, *Methanex* , Partial Award at pt. IV, ch. D, para. 7 [Exhibit RLA-030] ("*[A]s a matter of general international law*, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.") (emphasis added); *Feldman*, Award at para. 103 [Exhibit RLA-031] ("[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that *customary international law* recognizes this.") (emphasis added).

438. The approach taken in the arbitral decisions that Respondent cited is consonant with the Vienna Convention on the Law of Treaties ("VCLT").[873] The VCLT requires that interpretation of the FTA take into account "[a]ny relevant rules of international law applicable in the relations between the parties."[874] The *Saluka* tribunal, analyzing a treaty with no explicit police powers carve-out, referenced the VCLT in applying the police powers doctrine to its expropriation analysis.[875]

439. Claimant cites a single case, *Tecmed v. Mexico*, to support its novel police powers theory. Claimant says that the *Tecmed* tribunal "did not recognize the existence and general applicability of the police powers doctrine in international investment law."[876] According to Claimant, the *Tecmed* tribunal considered a treaty without an explicit police powers carve-out (the Mexico-Spain BIT), and on that basis, found that police powers did not apply.[877] Claimant then invites the Tribunal to refuse to apply the police powers doctrine here because the FTA does not specifically reference the principle.[878]

440. Claimant misrepresents *Tecmed*. First, the *Tecmed* tribunal confirmed that, "[i]n addition to the provisions of the Agreement, the Arbitral Tribunal has to resolve any dispute submitted to it by applying international law provisions ... [and] customary international

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[873] Claimant accepts, and purports to apply, the Vienna Convention in its discussion of police powers. *See* Claimant's Reply at paras. 293-94 ("Here too the Tribunal must start its analysis by reference to the text of the Canada-Perú FTA, which it must interpret in accordance with the Vienna Convention on the Law of Treaties ... .").

[874] Vienna Convention on the Law of Treaties, May 23, 1969 ("VCLT"), at Art. 31(3)(c) [Exhibit CL-0039].

[875] *Saluka*, Partial Award at para. 254 ("In interpreting a treaty, account has to be taken of 'any relevant rules of international law applicable in the relations between the parties' – a requirement which the International Court of Justice (ICJ) has held includes relevant rules of general customary international law.") (internal citations omitted) [Exhibit CL-0091].

[876] Claimant's Reply at para. 292.

[877] Claimant's Reply at para. 293 (referring to *Técnica Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ("*Tecmed*, Award"), at para. 122 [Exhibit CL-0040]).

[878] Claimant's Reply at para. 294.

law ... ."[879] Next, and critically, the *Tecmed* tribunal considered whether the State action was expropriatory based on:

> [t]he principle that the State's exercise of its sovereign powers within the framework of its *police power* may cause economic damage to those subject to its powers as administrator without entitling them to any compensation.[880]

441. The *Tecmed* tribunal went on to conclude that the existence and relevance of the police powers doctrine was "undisputable."[881] In short, *Tecmed* (the only case Claimant cites on this issue), does not support Claimant's argument, and in fact confirms just the opposite.

442. Even if the Tribunal were to adopt Claimant's novel position and hold that the police powers doctrine only applies where a treaty expressly so says, the police powers defense would still be available to Respondent. Chapter 22 of the Perú-Canada FTA contains certain "General Exceptions," one of which is that:

> nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health....[882]

443. This express carve-out for measures—like the measures at issue here—that are necessary to protect human life or health, is precisely the type of explicit, textual exception that Claimant says is necessary for the police powers doctrine to apply. Thus, even under Claimant's flawed test, the principle of a sovereign right to exercise police powers without such exercise

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[879] *Tecmed*, Award at para. 116 [Exhibit CLA-0040].

[880] *Tecmed*, Award at para. 119 (emphasis added) [Exhibit CLA-0040]. Claimant's argument that this quotation relates only to the State's *domestic* law is simply wrong. Claimant's Reply at para. 292. The tribunal here was discussing the State's international obligations, and whether the State action would constitute an expropriatory decision in an international forum, before continuing to discuss "[a]nother undisputed issue" that only "the domestic laws of the State" can determine whether the State action was a legitimate exercise of power. *See Tecmed*, Award at paras. 118-20 [Exhibit CLA-0040].

[881] *Tecmed*, Award at para. 119 [Exhibit CLA-0040].

[882] Perú-Canada FTA at Art. 2201.3 [Exhibit R-390].

being deemed expropriatory still applies. In the end, Claimant's effort to deny Respondent recourse to the police powers doctrine—a bedrock principle that investment treaty tribunals have recognized, and States have relied upon, for decades—must fail.

b. The police powers doctrine applies to regulations of general application as well as measures that enforce generally applicable statutes

444. In its Counter-Memorial, Respondent described the breadth of the police powers doctrine, explaining that it applies to general regulations *and* to State actions directed at individual investors.[883] Claimant does not dispute that general regulations fall within the police powers exception. In fact, Claimant admits that: "State measures with a general welfare purpose do not impose international liability on States 'except in cases where the State's action is obviously disproportionate to the need being addressed.'"[884] However, Claimant argues that the police powers exception does *not* apply to measures directed at specific investors. According to Claimant, "Supreme Decree 032 specifically targeted Bear Creek" and therefore, cannot possibly be excused under the police powers doctrine.[885]

445. Claimant's argument is devoid of legal or factual support. With respect to its legal argument, Claimant offers no authority to support its position that the police powers doctrine is limited to statutes of general application.[886] Claimant simply invents and asserts this notion in a failed attempt to distinguish *Saluka* and *Invesmart*—two cases that Respondent cited, which establish that the police powers doctrine applies to measures of specific application to a

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[883] Respondent's Counter-Memorial at paras. 232-237; *see also Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award (Redacted), June 26, 2009 ("*Invesmart*, Award (Redacted)"), at paras. 498 *et seq.* [Exhibit RLA-040] (emphasis added); *Saluka*, Partial Award at para. 267 *et seq.* [Exhibit CL-0091].

[884] Claimant's Reply at para. 262 (quoting *LG&E Energy Corp. et. al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006 [Exhibit CL-0089]).

[885] Claimant's Reply at para. 300.

[886] Claimant's Reply at paras. 296-306.

single investor.[887] Furthermore, Claimant's position is at odds with foundational police powers jurisprudence, which first recognized and applied the doctrine to acts of State focused on specific entities.[888] In the absence of a legal foundation for Claimant's argument, the Tribunal should reject Claimant's position that the police powers exception applies only with respect to generally applicable regulations.

446. Although Claimant's failure to justify its legal position is sufficient for the Tribunal to set aside the argument, two additional points bear mention:

- *First*, although Supreme Decree No. 032 had elements that were specific in application,[889] the measure enforced Article 71 of Perú's Constitution, which of course applies generally. It is unclear why the police powers exception would attach to Article 71 (as it seems Claimant would admit), but not Supreme Decree No. 032, a measure designed to uphold and enforce that Constitutional provision.

- *Second*, while Claimant focuses on one article of Supreme Decree No. 032 and deems the entire measure "specific," this does not tell the whole story. In addition to finding that circumstances no longer supported a public necessity declaration in Claimant's favor (Article 1), the Supplementary Provision of Supreme Decree No. 032 provided that *all* mineral extraction in the districts of Puno where Santa Ana was located would be prohibited under forthcoming regulations.[890] That Supplementary Provision applied to *all* mining concessions in those districts—including, but not only Claimant's concessions.

447. Respondent's position that the police powers doctrine applies to measures of specific application finds support in investment treaty jurisprudence. In its Counter-Memorial, in addition to numerous cases upholding general regulatory provisions under the police powers

[887] *Invesmart* and *Saluka* are discussed in more detail at paragraphs 448 to 453 below.

[888] *See, e.g.*, *Too v. Greater Modesto Ins. Assoc.*, 23 Iran-U.S. Cl. Trib. Rep. 379, 386 (1989) [Exhibit RLA-[095]] (holding that the seizure of a restaurant's liquor license was justified as an exercise of police powers).

[889] Supreme Decree No. 032-2011-EM, June 25, 2011 ("Supreme Decree No. 032-2011-EM"), at Art. 1 [Exhibit C-0005].

[890] Supreme Decree No. 032-2011, at Single Supplementary Provision [Exhibit C-0005].

doctrine,[891] Respondent also cited cases in which tribunals applied the doctrine where—like Perú here—the State revoked a specific permission granted to a single investor.[892]

448. In *Invesmart*, the tribunal held that the State's cancellation of a single banking license was a non-expropriatory, regulatory act,[893] based on "the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order."[894] The tribunal explained that "[t]his is common sense. Otherwise, once having granted a license to operate a bank, the regulator could be constrained from revoking a license if such action were automatically to be labeled an expropriation at international law."[895]

449. Claimant tries in vain to distinguish the instant case from *Invesmart*. It claims first that *Invesmart* "centered on a statute of 'general applicability' that gave rise to a specific administrative act ...."[896] However, the claimant in *Invesmart*, like Claimant here, challenged only the specific administrative act (revocation of the banking license) as a violation of the investment treaty; it did not claim that the general banking statute violated its treaty rights,[897] as Claimant acknowledges.[898] The *Invesmart* tribunal also referred to the specific administrative act of the state, rather than the general statute, as the "*bona fide* regulatory measure that does not

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[891] *See* Respondent's Counter-Memorial at fn. 384.

[892] *See* Respondent's Counter-Memorial at paras. 233-37 (discussing *Saluka v. Czech Republic* and *Invesmart v. Czech Republic*).

[893] *Invesmart*, Award (Redacted) at para. 504 [Exhibit RLA-040].

[894] *Invesmart*, Award (Redacted) at para. 498 [Exhibit RLA-040].

[895] *Invesmart*, Award (Redacted) at para. 498 [Exhibit RLA-040].

[896] Claimant's Reply at para. 297.

[897] *See Invesmart*, Award (Redacted) at para. 501 ("A decision to revoke a bank's license ... is not reviewed at the international law level for its 'correctness', but rather for whether it offends the more basic requirements of international law.") [Exhibit RLA-040].

[898] Claimant's Reply at para. 297 ("Invesmart argued that this *revocation constituted an expropriation* of its investment.") (emphasis added).

fall within the scope" of the treaty's expropriation prohibition.[899] As such, it is clear that the *Invesmart* tribunal applied the police powers doctrine to the specific license revocation and concluded that the State did not expropriate the investment.

450. Claimant next tries to distinguish *Invesmart* on the basis that the "legal framework" under which Supreme Decree No. 032 was enacted cannot be compared to the "detailed national legal framework" under which the Czech Republic revoked Invesmart's banking license.[900] But the *Invesmart* tribunal did not conduct a searching analysis of the State's broader legal framework. To the contrary, the tribunal focused only on the regulators' specific decision, noting that:

> [n]umerous tribunals have held that when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. *Tribunals need not be satisfied that they would have made precisely the same decision* as the regulator in order for them to uphold such decisions."[901]

451. As such, *Invesmart* did not turn on an analysis of the "national legal framework." It follows that Claimant's suggested distinction is irrelevant.

452. In its Counter-Memorial, Respondent also discussed *Saluka*, another case where a tribunal found that a regulatory action against a single bank (a forced administration) constituted substantial deprivation, but that no compensation was due.[902] The *Saluka* tribunal instead held that the State had "adopted a measure which was valid and permissible as within its regulatory

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[899] *Invesmart*, Award (Redacted) at para. 520 [Exhibit RLA-040].

[900] *See* Claimant's Reply at paras. 297, 301.

[901] *Invesmart*, Award (Redacted) at para. 501(emphasis added) [Exhibit RLA-040].

[902] Respondent's Counter-Memorial at paras. 236-37.

powers, notwithstanding that the measure had the effect of eviscerating Saluka's investment....'"[903]

453. Once again, Claimant tries to distinguish *Saluka* from the case at hand by referring to immaterial differences. Specifically, Claimant asserts that the procedures under the Czech banking statute in *Saluka* were more transparent than the procedures Perú followed in revoking Claimant's public necessity declaration.[904] Even if accurate, this factual distinction is neither here nor there. It does nothing to prove Claimant's erroneous contention that the police powers exception does not apply to measures of specific application. Indeed, the *Saluka* tribunal explicitly concluded otherwise, stating that the measure—which applied specifically to the claimant in that case—was:

> a lawful and permissible regulatory action by the Czech Republic aimed at the general welfare of the State ... [and therefore, it] did not, fall within the notion of a 'deprivation' referred to in [the expropriation provision] of the Treaty, and thus did not involve a breach of the Respondent's obligations under that Article.[905]

454. In sum, even if Supreme Decree No. 032 could fairly be characterized as a specific regulatory act, Claimant's arguments fail to provide any basis to exclude specific regulatory acts—including those that impact one investment and one investor—from the ambit of the police powers exception.

c. <u>The police powers doctrine affords a margin of appreciation to States' sovereign choices</u>

455. In its Counter-Memorial, Respondent explained that, as a sovereign regulatory measure, Supreme Decree No. 032 is entitled to deference, as opposed to judicial second-

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[903] *Saluka*, Partial Award at para. 276 [Exhibit CL-0091].

[904] Claimant's Reply at paras. 304-05.

[905] *Saluka*, Partial Award at para. 275 [Exhibit CL-0091].

guessing.[906] In other words, Respondent's decision to enact Supreme Decree No. 032 should be granted a "presumption of legitimacy"[907] or a "margin of appreciation."[908] This regulatory deference affords State authorities a justified degree of latitude when making difficult decisions that require the balancing of interests.[909] The propriety of such deference is especially evident in the circumstances here, where Article 71 of Perú's Constitution confers upon the State's highest Executive body (the Council of Ministers) the discretion to assess broad questions of "public necessity" in light of the external and internal national security interests of the State. Clearly, measures adopted pursuant to Article 71 are exercises of maximum sovereign discretion that should be entitled to substantial deference.

456. The *S.D. Myers* tribunal recognized the "high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[910] In *Levy v. Perú*, the tribunal agreed that "it is unacceptable for an Arbitral Tribunal to 'step into the shoes' of any [State] organ and to 'second-guess' its actions."[911] Other tribunals have followed this established doctrine.[912]

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[906] *See* Respondent's Counter-Memorial at paras. 238-41.

[907] *Tza Yap Shum v. Republic of Perú*, ICSID Case No. ARB/07/6, Award, July 7, 2011 ("*Tza Yap Shum*"), at para. 95 [Exhibit RLA-041] ("the exercise of state regulatory and administrative power entails a *presumption of legitimacy.* This is particularly evident when it is noted that the State acts in areas of public interest of great importance as preserving order, health or morals (known as "police powers" state.") (emphasis added).

[908] *Invesmart*, Award (Redacted) at para. 484 [Exhibit RLA-040].

[909] *S.D. Myers, Inc. v. The Government of Canada*, UNCITRAL First Partial Award, November 13, 2000 ("*S.D. Myers*, First Partial Award"), at para. 261 ("Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive.") [Exhibit RLA-043].

[910] *S.D. Myers*, First Partial Award at para. 263 [Exhibit RLA-043].

[911] *Renée Rose Levy de Levi v. Republic of Perú*, ICSID Case No. ARB/10/17, Award, February 26, 2014, at para. 161 [Exhibit RLA-042].

[912] *See, e.g. Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012, at para. 8.35 ("[T]he Tribunal's task is not here to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith ... .") [Exhibit CL-0092]; *Saluka*, Partial Award at para. 273 ("[T]he Tribunal must in the

457. Nevertheless, at various points in its Reply submission, Claimant asks this Tribunal to step into the shoes of the Peruvian authorities, a task that is outside the Tribunal's mandate. For example, Claimant argues that, rather than enact Supreme Decree No. 032, Respondent should have "impose[d] order through the intercession of the National Police."[913] Strangely, this public policy suggestion comes from Claimant's constitutional law expert, who does not appear to have any notable experience in the fields of public safety, public health, or national security.[914] This is precisely the type of uninformed, after-the-fact second-guessing that international law rejects. What is more, in this instance, the proposed alternative demonstrates a lack of understanding of the policy decisions that the Peruvian authorities faced.

458. For example, history has shown that Respondent's suggestion of involving the National Police is misguided. In the past, National Police participation in mining protests in Perú has only escalated conflicts, leading to increases in injuries and even deaths.[915] For instance, as shown in the photograph below, during the 2011 protests in Puno, the National Police clashed with Aymara protestors in the northern part of the Department, at the airport in Juliaca. Six Peruvian citizens died in the ensuing conflict.[916]

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circumstances accept the justification given by the Czech banking regulator for its decision."), 284 (The treaty "does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's") [Exhibit CL-0091].

[913] Claimant's Reply at para. 278.

[914] *See* Expert Report of Alfredo Bullard González, May 26, 2015, at paras. 6-15.

[915] *See* "Tia Maria's Environmental Study Approval Causes Reaction in Perú," *AmericaExonomica*, August 7, 2014, *available at* http://www.americaeconomia.com/negocios-industrias/rechazo-causa-aprobacion-de-estudio-ambiental-de-tia-maria-en-Perú (last visited April 11, 2016) [Exhibit R-333]; "Tia Maria, The Long Conflict for the South," *La República Newspaper*, March 27, 2011, *available at* http://larepublica.pe/27-03-2011/tia-maria-el-largo-conflicto-del-sur (last visited April 11, 2016) [Exhibit R-334]; "Protests in Perú Against Copper Mine Project Leaves One Dead," *The Wall Street Journal*, May 5, 2015, *available at* http://www.wsj.com/articles/protests-in-Perú-against-copper-mine-project-leaves-one-dead-1430862159 (last visited April 8, 2015) [Exhibit R-335].

[916] "Strike Results with 6 People Dead," *La República Newspaper South Edition*, June 25, 2011 [Exhibit R-085].

CHOQUE. Policías disparan gas lacrimógeno para intentar controlar a la turba que quiso tomar el aeropuerto

Source: "Strike Results with 6 People Dead," *La República Newspaper South Edition*, June 25, 2011 [Exhibit R-085].

459. Claimant also proposes another curious alternative which, in its *post hoc* view, Respondent should have enacted instead to address the protests. Claimant argues that "Perú could have achieved the same result—of calming political pressure—by implementing other measures at its disposal, such as enacting a temporary measure ...."[917] This suggestion is misleading. Respondent *did* enact temporary measures, one month before it enacted Supreme Decree No. 032, when—among several other measures directed to different aspects of the protests—it temporarily suspended DGAAM's review of Claimant's EIA for one year.[918] The other measures included Supreme Decree No. 026, which suspended the granting of mining concessions in the Puno area for one year.[919]

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[917] Claimant's Reply at para. 262. Claimant cites to the first witness statement of Mr. Cesar Zegarra for the proposition that a temporary measure "was possible," but nowhere in his witness statement does Mr. Zegarra discuss the Government's consideration of such a measure or even what type of "temporary measure" could have been enacted. *See* Witness Statement of César Zegarra, October 6, 2015, ("Zegarra First Statement"), at paras. 23-26 [Exhibit RWS-003]. Mr. Fernando Gala explains that "the combination of the violent acts in Puno, which submerged the region into a terrible crisis, and the discovery of a possible constitutional violation placed the State between a rock and a sword. The State acted reasonably and appropriately in that particular moment, faced with a unique situation.." Second Witness Statement of Fernando Gala, April 4, 2016, at para. 6 [Exhibit RWS-005].

[918] Resolution Suspending the Environmental Impact Study of the Santa Ana Project, Directorial Resolution No. 162-2011-MEM-AM, May 30, 2011 [Exhibit C-0098].

[919] Decree Suspending Admission of New Mining Requests in the Provinces of Chucuito, El Collao, Puno and Yunguyo in the Puno Department, Supreme Decree No. 026-2011-EM, May 29, 2011 [Exhibit R-025].

460. Unfortunately, these temporary measures did not quell the protests. It was in June 2011—the month after the enactment of Supreme Decree No. 026—that six people were killed in the clashes with police at Juliaca Airport in the northern front of the Puno protests.[920] The protests continued throughout June until the Government enacted Supreme Decree No. 032, again among other measures addressed to the protesters' concerns.[921] As such, Respondent *did* attempt to quell the protests using "temporary measures" before it enacted Supreme Decree No. 032, but these interventions were ineffective.

461. Claimant's suggestion that Respondent should have relied on temporary measures is even more inappropriate considering that Claimant *challenged* the temporary suspension of its EIA in the Peruvian administrative courts.[922] More to the point, Claimant even challenges the temporary measure in this arbitration today as a breach of the FET protections of the Treaty,[923] in addition to calling it "improper[]" and "contrary to Peruvian law."[924]

462. In the end, Claimant's examples of allegedly more palatable "alternatives" only underscore the folly of engaging in after-the-fact second-guessing of a State's sovereign regulatory choices—an exercise that tribunals are not specialized, nor empowered, to undertake. For this reason, international law affords States' sovereign policy decisions—especially those

[920] "Strike Results with 6 People Dead," *La República Newspaper South Edition*, June 25, 2011 [Exhibit R-085].

[921] *See* Respondent's Counter-Memorial at paras. 118-29.

[922] Letter from Bear Creek to the DGAAM, June 17, 2011 [Exhibit C-0166].

[923] Claimant's Memorial at para. 178; Claimant's Reply at para. 396.

[924] Claimant's Reply at para. 123.

made in times of crisis and taken in the public interest—a "presumption of legitimacy."[925] The Tribunal should afford Respondent that deference.

d. <u>The police powers doctrine applies because Respondent issued Supreme Decree No. 032 to protect its citizens and safeguard the integrity of Perú's Constitution</u>

463. In its Counter-Memorial,[926] and in the factual Sections above,[927] Respondent demonstrated that it adopted Supreme Decree No. 032 for legitimate public purposes, including to address the causes of violent protests that threatened the health and safety of Perú's citizens and to protect the integrity of its constitutional processes and its sovereignty over natural resources. As such, the enactment of Supreme Decree No. 032 qualifies as an exercise of Perú's police powers. Respondent has addressed, provided support for, and adequately proven its motivations for adopting Supreme Decree No. 032 throughout these proceedings.[928] We will not repeat those points here.

464. All that remains is Claimant's unsupported, uninformed and illogical argument that Respondent issued Supreme Decree No. 032 for "political" reasons. Claimant's position is that the entire purpose of Supreme Decree No. 032 was to placate a small political minority led by Mr. Walter Aduviri in a remote, rural area of Perú.[929] This justification, aside from being

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[925] *Tza Yap Shum* at para. 95 [Exhibit RLA-041]. The FTA reinforces this principle through the explicit carve-outs that appear in Chapter 22, which state, *inter alia*:

> … nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health …; (b) to ensure compliance with laws and regulations …; or (c) for the conservation of living or non-living exhaustible natural resources….
>
> Nothing in this Agreement shall be construed: … (b) to prevent either Party from taking any actions that it considers necessary for the protection of its essential security interests…"

Perú-Canada FTA, Articles 2201(3) and 2202 [Exhibit C-0001].

[926] Respondent's Counter-Memorial at paras. 116, 142-43, 146.

[927] *See supra* Section II.F.

[928] *See, e.g.*, Respondent's Counter-Memorial at paras. 244 *et seq.*

[929] *See, e.g.* Claimant's Memorial at paras. 2 ("[T]he sole purpose of Supreme Decree 032 was to placate a minority of political activists in the remote region of Puno . . . ."), 101 ("[T]he Government demonstrated its willingness to

false, simply makes no sense. Supreme Decree No. 032 was issued by an outgoing Government with only a one month remaining in office. Claimant has yet to explain (because it cannot) precisely what "political" gain the outgoing Government could have received from enacting the Decree. After two rounds of pleadings in which Claimant failed to clarify how its "political" story is in any way logical—let alone prove that it is true—the Tribunal has no basis upon which to accept Claimant's argument.

465. The reality is what Respondent's witnesses—who attended meetings with the protestors, debated potential solutions with stakeholders, and actually made the decision to issue the Decree—have explained: Supreme Decree No. 032 was motivated by the dual public purposes of addressing a violation of Article 71 of the Peruvian Constitution and resolving the months-long, violent social conflict in Puno. These reasons are legitimate justifications for the invocation of a State's sovereign police powers, and as such, the Tribunal should reject Claimant's expropriation claim.

2. Claimant Cannot Meet the Heightened Standard for Indirect Expropriation Under Annex 812.1 of the FTA

466. As just explained, Claimant's expropriation claim fails because Supreme Decree No. 032 constitutes a legitimate exercise of Respondent's sovereign police powers. But, even if the Tribunal were to hold otherwise, Claimant still would not be able to demonstrate that Respondent's actions amounted to a *direct* expropriation (as explained in Section 2(a) below).

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sacrifice an advanced mining project to appease political activists") (quoting Witness Statement of Andrew T. Swarthout, May 28, 2015, at para. 46), 135 ("[T]he Government had acted out of political expediency without any analysis of the purported 'social and environmental conditions' and the means available to 'safeguard' them."); Claimant's Reply at paras. 20 ("[T]he real basis for the enactment of Supreme Decree 032 [was], namely the appeasement of the political protests in the south of the Department of Puno . . . ."), 137 ("The truth is that Perú enacted Supreme Decree 032, revoking Supreme Decree 083 and expropriating Bear Creek's Santa Ana Project, in order to appease the political 'southern front' protests."), 262 ("The purpose of Supreme Decree 032 was to quell political pressure and social protests . . . ."), 265 ("Perú implemented Supreme Decree 032 in an effort to placate political pressure . . . ."), 272 ("Perú's expropriatory measures were taken to placate political opposition, not for a public purpose."), 273 ("Supreme Decree 032 was a direct response to extraneous political pressure: it was issued to placate a minority of political activists in the region of Puno . . . .").

As such, Claimant can only cast its claim as an allegation of *indirect* expropriation. Unfortunately for Claimant, pursuant to Annex 812.1 of the FTA, the Treaty only recognizes indirect expropriation in "rare circumstance," an elevated standard that Claimant cannot hope to meet (as explained in Section 2(b) below).

a. <u>Supreme Decree No. 032 is, if anything, an indirect expropriation because Claimant maintains title to the Santa Ana concessions</u>

467. As the *El Paso v. Argentina* tribunal made clear, the international law concept of a direct expropriation requires the transfer of title. That tribunal stated that "it can be declared by the Tribunal from the outset, without extensive reasoning, that no such [direct] expropriation occurred . . . . *In direct expropriation, there is a formal transfer of the title* of ownership from the foreign investor to the State . . . ."[930] This same requirement is found in Annex 812.1 of the Perú-Canada FTA, which expressly defines indirect expropriation as a measure that has "an effect equivalent to direct expropriation *without formal transfer of title*."[931] What is more, Claimant appears to accept the reality that a transfer from the investor to the State is a necessary element of a direct expropriation.[932]

468. Supreme Decree No. 032 did not cancel or transfer ownership over the Santa Ana concessions—it revoked the public necessity declaration that gave Claimant permission to

[930] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, October 31, 2011, at paras. 265-266 [Exhibit CL-0095] (emphasis added).

[931] Perú-Canada FTA at Annex 812.1 [Exhibit C-0001] (emphasis added).

[932] *See* Claimant's Reply at paras. 313 ("As the tribunal in *Enron v. Argentina* explained, direct expropriation requires the transfer of 'at least some essential component of property rights ... to a different beneficiary, in particular the State.'") (quoting *Enron Corporation, Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, at para. 243 [Exhibit CL-0150]), 314 (defining a "direct expropriation" as "'an open, deliberate and unequivocal intent . . . to deprive the owner of his or her property through the transfer of title or outright seizure.'" (quoting Nigel Blackaby, Constantine Partasides, *et. al.*, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, at para. 8.81 (6th Edition 2015) [Exhibit CL-0183]).

acquire or possess the concessions in the first place.[933] A public necessity decree, on its own, bestows no actionable right. Furthermore, Claimant *still holds the titles to* the Santa Ana concessions.[934] It may not continue to hold those titles indefinitely, given that MINEM is pursuing legal proceedings to nullify their transfer to Bear Creek on the basis of the company's Article 71 violation,[935] but Supreme Decree No. 032 itself did not deprive Claimant of those mineral rights.

469. Faced with the fact that a direct expropriation requires a transfer of title, and the reality that it still holds the titles to the Santa Ana concessions, Claimant seeks to invent a lower standard that ignores the transfer requirement altogether. Claimant argues that Supreme Decree No. 032 constituted a direct expropriation because it "had *the effect* of transferring" Claimant's property rights.[936]

470. Claimant derives its would-be escape-hatch from *Quiborax v. Bolivia*.[937] According to Claimant, *Quiborax* holds that State action need only "ha[ve] *the effect of transferring* the title" to amount to a direct expropriation.[938] But *Quiborax* does not remotely stand for that proposition.

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[933] Supreme Decree No. 032-2011-EM at Art. 1 ("Article 1 – Purpose of the norm: Supreme Decree No. 083-2007-EM is hereby derogated.") [Exhibit C-0005].

[934] *See* Respondent's Counter-Memorial at para. 251.

[935] *See* Inefficacy Law Suit, July 14, 2011 ("Inefficacy Law Suit"), at I [Exhibit C-0112]; *see also* Respondent's Counter-Memorial at paras. 158-163

[936] Claimant's Reply at para. 317 (emphasis added).

[937] Claimant's Reply at paras. 317-318.

[938] Claimant's Reply at para. 316 (emphasis added) (quoting *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, September 16, 2015 ("*Quiborax*, Award"), at para. 229 [Exhibit CL-0184]).

471. In *Quiborax*, unlike Perú here, the State expressly revoked the claimant's mining concessions by decree.[939] That decree gave the claimant "thirty days to *physically hand over the concessions*."[940] Based on this decree—and its language mandating the transfer of title—the *Quiborax* tribunal held that the claimant in that case met the 'transfer of property' requirement for direct expropriation.[941]

472. Having no regard for the facts of the case or the *Quiborax* tribunal's actual legal analysis, Claimant plucks the phrase "had the effect of transferring the title" from the middle of a sentence, and announces that *this* is the test for direct expropriation under international law. Claimant's submission is untenable. First, the snippet of text that Claimant cites appears in a *factual* sentence, not a legal conclusion (that sentence reads: "Here, it is undisputed that the Revocation Decree *had the effect of transferring the title* of NMM's mining concessions to the State."[942]). Second, and more importantly, that factual statement is immediately preceded by the *Quiborax* tribunal's actual legal holding, which is that: "for a direct expropriation to occur, *there must be a forcible taking or transfer of title to the State* that deprives the investor of its investment."[943] In short, Claimant's misreading of *Quiborax* and the flawed test Claimant derives from it, have no merit. *Quiborax*, in fact, supports Respondent's position that a direct expropriation requires an actual transfer of title to the State.

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[939] *Quiborax*, Award at para. 208 (reproducing in full the "Revocation Decree," which expressly revoked the claimant's mining concessions and gave the claimant "thirty days to *physically hand over the concessions*") (emphasis added) [Exhibit CL-0184].

[940] *Quiborax*, Award at para. 208 [Exhibit CL-0184] (emphasis added).

[941] *See Quiborax*, Award at para. 228 ("[F]or a direct expropriation to occur, there must be a *forcible taking or transfer of title to the State* that deprives the investor of its investment") [Exhibit CL-0184] (emphasis added).

[942] *Quiborax*, Award at para. 229 [Exhibit CL-0184] (emphasis added).

[943] *Quiborax*, Award at para. 228 [Exhibit CL-0184] (emphasis added).

473. Undeterred, Claimant hopes to revive its argument by claiming that it was the 2007 public necessity decree itself (and not the concessions) that Respondent expropriated.[944] Claimant portrays the public necessity decree as an "essential component" of its rights[945]—which is irrelevant—and as the source of several valuable substantive rights[946]—which is simply wrong.

474. First, the fact that the revocation of the public necessity decree had a detrimental effect on Claimant's property rights (limited as they are[947]) is an argument for *indirect* expropriation, not *direct* expropriation. Second, the public necessity decree did not itself grant Claimant any "specific mining rights;"[948] it merely granted Claimant *permission* to proceed to acquire certain mining concessions.

475. That Claimant acquired no substantive rights through the public necessity decree itself is clear from the following hypothetical: If Respondent on one day had issued Supreme Decree No. 083 granting the public necessity decree to Claimant and then the next day—before Claimant ever acquired the Santa Ana concessions—Respondent had issued Supreme Decree No. 032 revoking the public necessity decree, then Claimant would have acquired precisely *no* valuable rights. It is the concession, not the public necessity declaration, that allows Claimant to apply for permits and authorizations, and to exclude others from exploiting minerals on the

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[944] To the extent that Claimant argues that the public necessity decree was transferred to the State, that outcome would be illogical. The State would not need a public necessity decree to exploit the resources because it is not a foreign national attempting to own property in the border region; it would only need the concessions, which Claimant at all times maintained.

[945] *See* Claimant's Reply at paras. 318-321. *But cf. Saluka*, Partial Award at para. 276 (finding no expropriation "based on the totality of the evidence which has been presented ... notwithstanding that the measure had the effect of eviscerating Saluka's investment") [Exhibit CL-0091].

[946] *See* Claimant's Reply at paras. 322-324.

[947] *See* Section I.A.3 below (discussing the limited rights that Claimant possessed at the time that Supreme Decree No. 032 was issued).

[948] *See* Claimant's Reply *Chapeau* to para. 322.

covered properties. Here, Claimant still holds titles to the concession, and therefore no specific, valuable rights have been transferred.[949] As such, Claimant has no foundation for a claim of direct expropriation.

b. Claimant cannot meet the heightened standard for indirect expropriation in Annex 812.1 of the FTA

476. As shown above, Claimant's only colorable claim for expropriation is one based on a (flawed) assertion that Respondent *indirectly* expropriated its rights at Santa Ana. As such, even if it could overcome the police powers exception discussed in Section I.A.1 above, Claimant's expropriation claim fails unless it can meet the elevated burden for indirect expropriation in Annex 812.1(c) of the FTA, which states that:

> *Except in rare circumstances*, such as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory *measures of a Party that are designed and applied to protect legitimate public welfare objectives*, such as health, safety and the environment, *do not constitute indirect expropriation*.[950]

477. Claimant agrees that, to establish indirect expropriation, it must meet the "rare circumstances" test set forth in Annex 812.1(c).[951] Claimant's only argument, it seems, is that its indirect expropriation claim must *also* comport with Annex 812.1(b) (which mandates a case-by-case inquiry into the measure's economic impact, the extent of any interference with expectations, and the character of the measure), and that somehow this fact lowers Claimant's

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[949] If Respondent wins the MINEM lawsuit, then Claimant would lose the concessions. However, it is important to note that the court would not revoke the concessions; it would nullify them, because it would have found that they were acquired illegally. *See* Inefficacy Law Suit [Exhibit C-0112]. Claimant has not argued that any part of that proceeding is an expropriatory act.

[950] Perú-Canada FTA at Annex 812.1(c) [Exhibit C-0001] (emphasis added).

[951] *See* Claimant's Reply at para. 247 (noting that the Tribunal should consider Annex 812.1(c) in its analysis).

burden with respect to Annex 812(c).[952] Claimant does not explain how *adding* a second test—both of which it must meet—will lessen its burden. Without conceding in any way that Claimant can meet the Annex 812.1(b) test, our analysis below focuses on the "rare circumstances" test in Annex 812.1(c).

478. Pursuant to Annex 812.1(c), reproduced in full above, Claimant's indirect expropriation claim will fail unless Claimant can prove that Supreme Decree No. 032 (i) represents a "rare circumstance;" (ii) is discriminatory; or (iii) was not designed to protect legitimate public welfare objectives such as public safety. Claimant has failed to prove *any* of these elements, much less all of them.

(i) Supreme Decree No. 032 does not represent a "rare circumstance" of indirect expropriation by a good faith governmental measure

479. Annex 812.1(c) does not define "rare circumstances," but it does provide a useful example. The provision notes that a regulation adopted or applied in "bad faith" would qualify as a rare circumstance.[953] As Respondent noted in its Counter-Memorial, by including bad faith as an example—a finding that tribunals have noted is very exceptional[954]—the drafters signaled that a claimant pursuing an indirect expropriation claim faces a very high bar in proving that a given set of circumstances is indeed "rare."[955] Respondent also noted that under *any* standard,

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[952] *See* Claimant's Reply at para. 247 (After conducting the case-by-case analysis under Part (b), "[t]he Tribunal then should consider whether the language in Annex 812.1(c) impacts its conclusion in any way, *i.e.*, whether Supreme Decree 032 is a non-discriminatory measure that was designed and applied to protect legitimate public welfare objectives.").

[953] *See* Perú-Canada FTA at Article 812.1 [Exhibit C-0001].

[954] *See ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013, at para. 275 [Exhibit RLA-049]; *Tza Yap Shum* at para. 125 [Exhibit RLA-041].

[955] Respondent's Counter-Memorial at para. 255.

Claimant cannot demonstrate rare circumstances, because there is nothing "rare" about a sovereign State acting to protect the safety of its citizens.

480. Claimant responds with a reading of the "rare circumstances" provision that is truly outlandish. It adopts the position that the "rare circumstances" language is actually helpful to would-be claimants, because "[i]t does not say 'extremely uncommon' or 'very unlikely,' but simply 'rare.'"[956] This is no help to Claimant: "rare" is obviously rare enough to defeat its claim.

481. Claimant then goes on to list a series of unproven factual allegations that are *specific* to this case, accepts all of them as true, and then concludes that: "[f]or a measure to be issued in this manner and in the context of all of these circumstances is indeed 'rare'."[957] Under Claimant's theory, any would-be claimant could pass the "rare circumstances" test simply by presenting a handful of facts unique to its case (and all cases have *some* unique factual aspects), and then, based on those specific facts, declaring its circumstances to be "rare." This cannot be what the Contracting Parties intended when they agreed to the language in Annex 812.1(c). As such, Claimant's argument must be rejected.

(ii) Supreme Decree No. 032 is not discriminatory

482. Respondent's Counter-Memorial also addressed the language in Annex 812.1(c) regarding "non-discriminatory" measures, and explained that Supreme Decree No. 032 did not discriminate against Claimant.[958] Rather, Respondent took specific action related to Santa Ana based on its unique circumstances, *i.e.*, its dubious acquisition and its status as a lightning rod for protest.

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[956] Claimant's Reply at para. 258 (quoting Anthony Sanders, *Of All Things Made in America Why Are We Exporting the Penn Central Test*, 30 NW. J. INT'L L. & BUS. 339, 363-364 (2010)) .

[957] Claimant's Reply at para. 268.

[958] Respondent's Counter-Memorial at para. 259.

483. Claimant argues that Supreme Decree No. 032 was in fact discriminatory, because "[n]o other mining company lost its right to own and operate its mining concessions purportedly to quell the social protests. Nor did any other foreign mining company see its supreme decree revoked for using a transaction structure that was similar to Bear Creek's."[959] Claimant does not, however, identify a single comparable mining company that: (a) was a specific target of protest; or (b) can be proven to have used a scheme similar to Claimant's to acquire its concession rights; let alone *both* of those features, which would need to be shown to make the circumstances actually similar. Unless and until Claimant can identify another mining company in similar circumstances, its discrimination argument merits no consideration.

(iii) Supreme Decree No. 032 addresses a legitimate public welfare objective

484. Lastly, Respondent explained that it implemented Supreme Decree No. 032 to further the important public welfare objectives of protecting public safety and safeguarding the integrity of its constitutional and regulatory system for natural resources.[960] Respondent's only response was to repeat its refrain that Supreme Decree No. 032 was adopted for "political" reasons.[961] As explained above, however, the suggestion that the Decree was somehow politically motivated is unsupported, illogical, and at odds with considerable witness testimony.[962] As such, the Tribunal must reject this argument.

485. In sum, Respondent has explained that Supreme Decree No. 032 is a non-discriminatory measure, adopted absent "rare circumstances," in order to further legitimate

[959] Claimant's Reply at para. 264.

[960] Respondent's Counter-Memorial at paras. 144-150. *See also* Witness Statement of Fernando Gala, October 6, 2015, at para. 42 [Exhibit RWS-001]; Zegarra First Statement at paras. 25-26 [Exhibit RWS- 003].

[961] Claimant's Reply at para. 265.

[962] *See* Section A.1.d above.

sovereign interests.[963] As such, Claimant cannot meet its burden under Annex 812.1(c), and its indirect expropriation claim must fail.

3. Claimant Possessed Limited Rights at Santa Ana, and Respondent Could Not Have Expropriated Rights That Claimant Never Held

486. Finally, as Respondent explained in its Counter-Memorial,[964] even if the Tribunal were to determine that Decree No. 032 was expropriatory, the scope of that expropriation would be very limited. Claimant's expropriation claim is bound by the rights it actually possessed, which were few.[965]

487. Dr. Rodríguez-Mariátegui has explained that, at the time of the alleged expropriation, Claimant was mired in the early stages of applying for the array of Peruvian regulatory approvals necessary to build and operate a mine.[966] As of the date of Supreme Decree No. 032, Claimant had not obtained *any* of the approvals required for the exploitation phase of the project.[967] In fact, Claimant did not even have the right physically to use the Santa Ana Project site for construction or exploitation, because it had not yet secured land use agreements from the four affected communities and more than 90 land possessors.[968] Claimant's regulatory path going forward was long and complex, and many junior mining companies never progress

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[963] Respondent's Counter-Memorial at paras. 255 *et seq*.

[964] Respondent's Counter-Memorial at paras. 225-226.

[965] Respondent's Counter-Memorial at paras. 225-226.

[966] *See* Second Expert Report of Luis Rodríguez-Mariátegui Canny, March 31, 2016 ("Rodríguez-Mariátegui Second Report"), at paras. 74, 133 [Exhibit REX-009].

[967] *See* Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ("Rodríguez-Mariátegui Report"), at para. 47 ("[T]he EIA—and its approval in certain cases—could be considered the starting point for filing for all of the other permits, licenses, authorizations, certificates, and registrations required for its various components and processes.") [Exhibit REX-003]; *see* Witness Statement of Felipe A. Ramírez Delpino, October 6, 2015, at para. 5 [Exhibit RWS-002].

[968] Dr. Rodriguez-Mariátegui has explained that Claimant had not negotiated land use rights with the local communities or the more than 90 individual holders that owned the land on which Santa Ana was to be built. *See* Rodriguez-Mariátegui Report at paras. 40, 67 [Exhibit REX-003]; Rodríguez-Mariátegui Second Report at para. 111 [Exhibit REX-009].

beyond the regulatory approval phase.[969] And it is clear that Claimant sorely lacked the necessary social license from the surrounding communities that would be essential to move the Project forward, even if Claimant could obtain every governmental license or permit. As other stalled mining projects in Perú illustrate, community opposition can thwart a project even when the mining company has an EIA approval in hand.[970] Moreover, as noted above, Claimant has never navigated the regulatory process in Perú or anywhere else in the world.[971] As such, whether Claimant would have ever obtained the right to mine at Santa Ana is very uncertain.

488. Thus, even if Claimant could somehow demonstrate that an expropriation occurred (it cannot), and it could somehow show that it obtained title to the Santa Ana concessions lawfully (it cannot),[972] Claimant's expropriation claim would still be restricted to the limited rights it held over the concessions, *i.e.*, the exclusive right to *attempt* to obtain the right to mine at the site.

489. Claimant's response to Respondent's position is puzzling. Claimant cannot seriously dispute the fact that it needed to apply for and obtain a wide range of permits and approvals before building and operating a mine at Santa Ana. But Claimant asserts nonetheless that it somehow "owned" the rights to:

- "[E]xplore *and exploit* mineral resources granted;" and
- "[U]se and enjoyment of the natural resource granted and, consequently, the property of the fruits and products that are *extracted*."[973]

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[969] Expert Report of SRK Consulting, October 6, 2015 ("First SRK Report"), at paras. 90-92 [Exhibit REX-005]; Rodríguez-Mariátegui Report at paras. 40, 107-108 [Exhibit REX-003].

[970] *See* Section II.H.2 above.

[971] *See* paras. 26 above.

[972] *See* Section II.B above.

[973] Claimant's Reply at paras. 237, 322-24.

490. In short, Claimant's argument seems to be that even though it is not *allowed* to build or operate a mine and could never be sure of obtaining permission to do so even if Supreme Decree No. 032 had never been issued, Claimant nevertheless somehow "owns" the right to do so. This position, which Claimant bases on tortured readings of obscure provisions of Peruvian law, is confused, confusing and illogical.

491. If it is Claimant's position that it holds some sort of contingent, future right to mine at Santa Ana (and again, it is not at all clear what, exactly, Claimant's position is), this still would not help Claimant. The *Generation Ukraine v. Ukraine* tribunal was clear that with respect to expropriation, "it is important to be meticulous in identifying the rights duly held by the Claimant *at the particular moment* when allegedly expropriatory acts occurred."[974] Thus, a claim based on some provisional future right is not cognizable.

492. In the end, no amount of muddled discussion of Peruvian law can change the simple facts that: (1) Claimant may only base its expropriation claim on the rights that it held at the time of the alleged expropriation;[975] and (2) in Claimant's case, it held only the exclusive right to *attempt* to obtain the right to mine at Santa Ana. Claimant had nothing more, and nothing more could have been taken from it.

4. Conclusion on Expropriation

493. As set out above, Supreme Decree No. 032 was not an expropriation—direct or indirect—because it was a legitimate exercise of Perú's sovereign police powers. The Peruvian Government issued Supreme Decree No. 032 because it determined that it would be an effective means of addressing the causes of increasingly violent protests, and safeguarding the

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[974] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Final Award, September 16, 2003 ("*Generation Ukraine*, Final Award"), at para. 6.2 (emphasis added) [Exhibit RLA-080].

[975] *Generation Ukraine*, Final Award at para. 8.8 ("[T]here cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place . . . .") [Exhibit RLA-080].

constitutional processes that Bear Creek had knowingly circumvented. This sovereign, discretionary choice deserves deference under international law. Even if, however, the Tribunal were to reject Respondent's police powers defense, Claimant's expropriation claim would still fail, because Claimant cannot demonstrate the requisite "rare circumstances" to prove an indirect expropriation under Annex 812.1. Finally, even if the Tribunal were to conclude that Supreme Decree No. 032 is expropriatory, the scope of that expropriation would be small. A State can only expropriate rights that an investor possesses, and Claimant's rights at Santa Ana were very limited. For the reasons set out above, the Tribunal must reject Claimant's expropriation claim.

B. RESPONDENT AFFORDED CLAIMANT FAIR AND EQUITABLE TREATMENT IN ACCORDANCE WITH THE FTA

494. In its Counter-Memorial, Respondent explained that: (i) the FTA's guarantee of fair and equitable treatment ("FET") is limited to the minimum standard of treatment under customary international law ("MST");[976] (ii) international tribunals universally recognize that claimants face a high burden when asserting an FET breach under the international minimum standard; (iii) Claimant cannot clear the high factual hurdle for proving an FET breach, and as such, Claimant's FET claim must fail.[977]

495. Faced with this reality, Claimant adopts a two-part strategy: First, Claimant tries to revive its minimum standard of treatment claim by twisting international legal precedent, exaggerating the facts, and misrepresenting Respondent's arguments. Second, Claimant renews its attempt to "import" a less burdensome, autonomous FET standard, even though this would conflict with the plain text of Treaty and the express will of the Contracting Parties. For the

[976] Perú-Canada FTA at Article 805 [Exhibit C-0001].

[977] Respondent's Counter-Memorial at paras. 263 *et seq*.

reasons set out below, the Tribunal must reject Claimant's attempt to re-write the FTA's FET clause, and to manufacture Treaty breaches where no such violations exist.

496. In the sections that follow, Respondent explains that: (1) the FTA's FET provision does not guarantee treatment beyond the low threshold under the MST; (2) Claimant has not identified any FET principle under customary international law that Respondent arguably violated; (3) Claimant's FET claim also fails because it cannot prove that Respondent's actions fell below the international minimum standard for fair and equitable treatment, or any other FET standard; and (4) that Claimant cannot import an autonomous FET standard because the FTA excludes pre-existing obligations from its most-favored nation clause, and because doing so would conflict with the will of the FTA's State signatories.

1. The FTA Does Not Guarantee Fair and Equitable Treatment Beyond the International Minimum Standard of Treatment, Which Places a High Burden on Claimant

497. In Article 805 of the FTA, the Contracting Parties agreed to guarantee FET up to—but not beyond—the minimum standard of treatment under customary international law. The Treaty is unambiguous in this respect:

> **Article 805: *Minimum Standard* of Treatment**
>
> 1. Each Party shall accord to covered investments treatment <u>in</u> *accordance with the customary international law minimum standard of treatment* of aliens, *including fair and equitable treatment* and full protection and security.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" in paragraph 1 *do not require treatment in addition to or beyond that which is required by the customary international law minimum standard* of treatment of aliens.[978]

[978] Perú-Canada FTA at Article 805 [Exhibit C-0001] (emphasis added).

498. In its Counter-Memorial, Respondent cited an array of international legal sources spanning 90 years, each of which reached the same conclusion: the international minimum standard represents a low bar for States, but a very high hurdle for would-be claimants.[979] In the words of Professor Borchard, the MST is meant to ensure that State action does not "fall[] below a civilized standard."[980] In October of last year, the *Al Tamimi v. Oman* tribunal echoed Professor Borchard's analysis, holding that: "[i]t is broadly accepted that the minimum standard of treatment under customary international law imposes a relatively high bar for breach. … [T]he minimum standard of treatment must be understood in this context only as the conduct expected of all States as a bare, invariable minimum."[981]

499. In short, Respondent has demonstrated that international tribunals take a deferential approach when addressing State action under the international minimum standard. This principle—deference to a State's sovereign choices—should guide this Tribunal's FET analysis.

500. Claimant's response is puzzling. *First*, Claimant wrongly ascribes to Respondent the position that the Tribunal must ignore modern jurisprudence and apply the FET standard

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[979] *See, e.g.*, *LFH Neer and Pauline Neer (USA) v. United Mexican States* (1926), 4 RIAA 60, 61-62 [Exhibit RLA-051]; Jan Paulsson and Georgios Petrochilos, *Neer-ly Misled?*, ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL, Fall 2007, 242, 242-257, citing the *Faulkner*, *Roberts* and *Chattin* cases, at 253-257 [Exhibit RLA-052]; *S.D. Myers Inc. v. Canada*, UNCITRAL First Partial Award, November 13, 2000 ("*S.D. Myers,* First Partial Award"), paras. 259, 261 [Exhibit RLA-043]; *Glamis Gold v. United States,* UNCITRAL, Award, June 8, 2009 ("*Glamis Gold* "), para. 615 [Exhibit RLA-046]; *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL Award, January 26, 2006 ("*Thunderbird*, Award."), para. 127 [Exhibit CL-0073]; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009 ("*Cargill*, Award"), para. 296 [Exhibit RLA-053]; *Loewen Group, Inc and Raymond L. Loewen. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award June 26, 2003 ("*Loewen Group*, Award"), para. 132 [Exhibit CL-0118]; *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 ("*Genin*, Award"), para. 367 [Exhibit RLA-054].

[980] Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y OF INT'L L. PROC. 51, 58 (1939) [Exhibit RLA-050].

[981] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, October 27, 2015 ("*Adel A Hamadi*, Award"), paras. 382-383 [Exhibit RLA-076].

announced in *Neer v. Mexico*.[982] Then Claimant argues at length that this approach is improper. Claimant is fighting a straw man: it is not, and has never been, Respondent's position that the Tribunal may only consider *Neer*. Respondent's position is that *Neer* remains relevant as the foundation of modern MST jurisprudence, and that this jurisprudence universally confirms that the MST presents a very high bar for claimants. This issue is discussed in Section 1(a) below.

501. *Second*, Claimant refers to various cases that it says represent the so-called "contemporary" minimum standard, in hopes of lowering the bar to prove a breach of the MST. Unfortunately for Claimant, each so-called "contemporary" cases that it cites lends further support to Respondent's position that the MST presents a very high hurdle for claimants. This issue is discussed in Section 1(b) below.

502. In the end, Claimant's arguments on MST do nothing to advance its case. In fact, the jurisprudence that Claimant invokes only bolsters Respondent's arguments.

a. International law jurisprudence establishes that the international minimum standard for FET presents a high bar for claimants

503. In its Counter-Memorial, Respondent demonstrated that *Neer v. Mexico* set the historical foundation for modern MST jurisprudence.[983] This seminal decision sets a high bar for would-be claimants, establishing that a breach of the MST requires action that amounts to: "an *outrage*, to *bad faith*, to *willful neglect* of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[984]

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[982] Claimant's Reply at paras. 332 *et seq*.

[983] Respondent's Counter-Memorial at paras. 269 *et seq*.

[984] *LFH Neer* at 61-62 [Exhibit RLA-051] (emphasis added). Several other historical cases applied the *Neer* standard or one very similar. *See* Paulsson and Petrochilos, *Neer-ly Misled?*, at 242-257, citing the *Faulkner*, *Roberts* and *Chattin* cases, at 253-257 [Exhibit RLA-052].

504. Respondent also explained that *Neer* has been invoked by an array of subsequent investment tribunals, and that this collective jurisprudence represents the modern MST.[985] For example, Respondent cited *Thunderbird v. Mexico*, a 2006 decision, which stated that:

> Notwithstanding the evolution of customary law since decisions such as *Neer* Claim in 1926, *the threshold for finding a violation of the minimum standard of treatment still remains high*, as illustrated by recent international jurisprudence.[986]

505. Respondent also cited *Glamis Gold*, a 2009 decision that invoked *Neer* in holding that State action must be "egregious" and "shocking" to breach the MST. *Glamis* observed that:

> The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment […], an act must be sufficiently *egregious and shocking* — a *gross* denial of justice, *manifest* arbitrariness, *blatant* unfairness, *a complete lack* of due process, *evident* discrimination, or a *manifest* lack of reasons — so as to fall below accepted international standards . . .[987]

506. These cases, which Respondent cited in its Counter-Memorial, establish two fundamental points: (i) *Neer* remains relevant to a modern MST analysis; and (ii) the bar for proving a breach of the MST remains very high. This was Respondent's position when it filed its Counter-Memorial, and it remains Respondent's position today.

507. Rather than engage with Respondent's actual argument, Claimant ascribes a new position to Respondent (that *only Neer* applies), and then wastes an entire section of its brief attacking a position that Respondent never endorsed.[988] Again, Respondent's position is not that *Neer*—and only *Neer*—defines the international minimum standard. Respondent's position is

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[985] Respondent's Counter-Memorial at para. 270 *et seq.*

[986] Respondent's Counter-Memorial at para. 270; *Thunderbird*, Award at para. 194 [Exhibit CL-0073] (emphasis added).

[987] Respondent's Counter-Memorial at para. 272; *Glamis Gold* at para. 616 [Exhibit RLA-046] (emphasis added).

[988] Claimant's Reply at paras. 332 *et seq*.

that *Neer* represents the historical root of MST, which subsequent tribunals have adopted and interpreted. While this Tribunal is not bound to follow *Neer* to the letter, it should be (and undoubtedly is) cognizant of the fact that *Neer* is the foundation of the modern MST. Furthermore, the Tribunal should note that recent arbitral awards have not strayed far from that foundation; as we discuss next, modern cases, including the jurisprudence that Claimant cites, confirm that the MST represents a very high hurdle for potential claimants.[989]

b. <u>So-called "contemporary" cases reinforce the fact that the international minimum standard presents a high bar for claimants</u>

508. As noted above, modern arbitral jurisprudence hews close to the seminal *Neer* decision. Claimant disputes this fact, arguing that the minimum standard of "today" offers more expansive protections for investors.[990] The only concrete example Claimant offers, however, is that: "tribunals today unanimously reject the 'bad faith' requirement, which Perú alleges is a prerequisite for finding a breach of MST."[991]

509. At the outset, Respondent notes that once again, Claimant has mischaracterized Respondent's argument. Respondent never claimed that proving bad faith is *required* to

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[989] *See, e.g.*, *Adel A Hamadi*, Award, at para. 390 [Exhibit RLA-076] ("to establish a breach of the minimum standard of treatment […], the Claimant must show that Oman has acted with a *gross or flagrant* disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law.") (emphasis added); *Loewen Group,* Award at para. 132 [Exhibit CL-0118] (noting that a violation of the minimum standard requires "[*m]anifest* injustice in the sense of a lack of due process leading to an outcome which *offends a sense of judicial propriety…*")(emphasis added); *Cargill*, Award at para. 296 [Exhibit RLA-053] ("The requirement of fair and equitable treatment is one aspect of this [international] minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were *grossly* unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an *unexpected* and *shocking* repudiation of a policy's very purpose and goals, or to otherwise *grossly* subvert a domestic law or policy for an ulterior motive; or involve an *utter* lack of due process so as to *offend judicial propriety*.") (emphasis added); *Genin*, Award at para. 367 [Exhibit RLA-054] ("[a]cts that would violate th[e] minimum standard would include acts showing a *willful* neglect of duty, an insufficiency of action falling *far below* international standards, or even subjective *bad faith*.") (emphasis added). *See also* the list of cases discussed in Section b(i) below.

[990] Claimant's Reply at para. 350.

[991] Claimant's Reply at para. 350.

substantiate an MST breach. Respondent stated that demonstrating bad faith is *sufficient*—but not required—to breach the MST.[992]

510. Regarding Claimant's broader argument—that the MST of "today" provides enhanced protection to investors—the cases that Claimant cites actually disprove Claimant's own theory. Below, we explain that: (i) the so-called "contemporary" cases Claimant raises confirm *Respondent's* position that the burden of proving a breach of the MST remains very high; and (ii) other modern cases, including, the very recently issued *Al Tamimi v. Oman* award, confirm that Claimant's FET claim is subject to a very high burden.

(i) The "contemporary" cases that Claimant cites confirm that the burden of proving a breach of the MST is very high

511. Claimant cites a series of cases that it says delineates the "contemporary" MST, which Claimant believes places a higher FET burden on States.[993] Claimant's favorite case for this proposition is *Waste Management II*, an award that Claimant cites repeatedly and at length.[994] But *Waste Management II* is neither particularly recent (it was decided more than a decade ago, in 2004) nor does it support Claimant's argument. In fact, the very passage Claimant quotes proves that the *Waste Management II* tribunal understood the MST to present a very high burden for claimants. Claimant recites the following passage:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, *grossly* unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a *manifest* failure of natural justice in

[992] Respondent's Counter-Memorial at para. 263.

[993] Claimant's Reply at paras. 350 *et seq*.

[994] Claimant's Reply at paras. 351 *et seq*.

> judicial proceedings or a *complete* lack of transparency and candour in an administrative process.[995]

512. Other tribunals have noted that the "use of adjective modifiers throughout arbitral awards," like those italicized above, "evidenc[e] a strict standard."[996] By invoking these modifiers—*e.g.* "grossly"; "manifest"; "complete"— the *Waste Management II* tribunal recognized that claimants alleging violations of the MST face a very high burden. The tribunal then applied that well-established, high standard to reach a predictable disposition: it dismissed the claimant's FET claims. The tribunal reasoned that "the evidence before it [did] not support the conclusion that the [respondent] acted in a *wholly* arbitrary way or in a way that was *grossly* unfair," and that therefore, no MST breach occurred.[997] In short, Claimant's reliance on *Waste Management II* is misplaced. In fact, the *Waste Management II* award provides further support for Respondent's position that the MST presents a very high bar for claimants.

513. The other "contemporary" cases that Claimant cites also support Respondent's position. As noted in the excerpts below, in each case that Claimant cites, the tribunal recognized that claimants alleging breach of the MST face a high burden:

Case That Claimant Cites	**Claimant's Reference**	**Statement Regarding MST**
Bilcon v. Canada	Reply at fns. 954 and 964	"[T]here is a high threshold for the conduct of a host state to rise to the level of a[n MST] breach;"[998] "[a]cts or omissions constituting a breach must be of a serious nature."[999]

[995] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004 ("*Waste Management*, Award"), para. 98 [Exhibit CL-0069].

[996] *Glamis Gold* at para. 614 [Exhibit RLA-046].

[997] *Waste Management*, Award at para. 115 [Exhibit CL-0069] (emphasis added).

[998] *Bilcon v. Canada*, PCA Case No. 2009-04, Award, March 17, 2015 ("*Bilcon*, Award"), para. 427 [Exhibit CL-0190].

[999] *Bilcon*, Award at para. 443 [Exhibit CL-0190].

Merrill & Ring v. Canada	Reply at fns. 954 and 964	With respect to "safety and due process" today's minimum standard is not broader than the definition in *Neer*;[1000] "It is also quite evident that NAFTA jurisprudence [on MST] has stiffened since the [2001] FTC Interpretation."[1001]
Teco v. Guatemala	Reply at fn. 964	Measures that are "*grossly* unfair" or that amount to a "lack of due process leading to an outcome which *offends judicial propriety*" are examples of State action that would violate the MST.[1002]
GAMI v. Mexico	Reply at fn. 964	"The failure to fulfill the objectives of administrative regulations without more does not necessarily rise to a breach of [the MST];" "A failure to satisfy requirements of national law does not necessarily violate [the MST]"[1003]
Mondev v. United States	Reply at fns. 954 and 955	The *Mondev* tribunal held that for a judicial decision to breach the MST it must be "*clearly* improper and discreditable."[1004]

514. It bears repeating that each of the above-listed cases was a decision that Claimant cited. Each of these awards, however, bolsters Respondent's position that the MST presents a very high hurdle for would-be claimants. In the following section, we explain that additional recent jurisprudence further buttresses Respondent's argument.

(ii) Other recent cases confirm that the burden of proving a breach of the MST is very high

515. The basic assumption of Claimant's MST argument is that "newer is better", *i.e.*, because the minimum standard of treatment is evolving, the Tribunal should give greater weight

[1000] *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, Award, March 31, 2010 ("*Merrill & Ring*, Award"), para. 213 [Exhibit CL-0188].

[1001] *Merrill & Ring*, Award at para. 200 [Exhibit CL-0188].

[1002] *Teco Guatemala Holdings LLC v. The Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, December 19, 2013, para. 454 [Exhibit CL-0070] (emphasis added).

[1003] *GAMI Investments, Inc. v. United Mexican States,* NAFTA UNCITRAL, Final Award, November 15, 2004, para. 97 [Exhibit CL-0034].

[1004] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para. 127 [Exhibit CL-0068] (emphasis added).

to more recent awards. If the Tribunal is persuaded by this argument, it should: (1) place less emphasis on awards like *Waste Management II* and *GAMI*, which are more than a decade old (and which, in any event, support Respondent's argument); and (2) consider closely the recent MST jurisprudence that Claimant does not cite.

516. For instance, Claimant failed to mention the May 2012 *Mobil v. Canada* decision on liability, which held that the MST:

> is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies changes and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to under [the MST] is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. *Those standards are set, as we have noted above, at a level which protects against egregious behavior*.[1005]

517. Additionally, if the Tribunal is persuaded that recentness is important, it should give weight to the *Al Tamimi v. Oman* Award. *Al Tamimi* was issued on October 27, 2015, well after the most recent award that Claimant cites, and more than a decade after the *Waste Management II* decision.

518. According to the *Al Tamimi* tribunal:

> to establish a breach of the minimum standard of treatment […], the Claimant must show that Oman has acted with a *gross or flagrant* disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, *wilful or otherwise egregious*, to protect a foreign investor's basic rights and

[1005] *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012 , para. 153 [Exhibit RLA-077] (emphasis added).

> expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard.[1006]

519. This strong language from *Al Tamimi*—the most recent award before this Tribunal—reinforces Respondent's core arguments: (1) the strict *Neer* standard remains the foundation of modern MST jurisprudence; and (2) this standard places a very high burden on claimants hoping to demonstrate a breach of the MST. In the words of the September 2009 *Cargill v. Mexico* Award (another recent award Claimant fails to mention), while modern awards may "adapt the principle underlying the holding of the *Neer* arbitration … [k]ey to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained."[1007]

520. In sum, recent case law confirms that *Neer* remains salient and that the burden on claimants to prove an FET breach under the MST remains very high. As explained in Section 3 below, Claimant has not met—and cannot meet—this elevated standard.

2. Claimant Has Not Identified a Principle of Customary International Law Regarding Fair and Equitable Treatment That Respondent Allegedly Violated

521. As noted above, the FTA in Article 805 guarantees fair and equitable treatment only "in accordance with the customary international law minimum standard of treatment of aliens...."[1008] To demonstrate a breach of this standard, Claimant must identify a specific rule of customary international law that Respondent violated. In its Memorial, Claimant failed to point

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[1006] *Adel A Hamadi*, Award at para. 390 [Exhibit RLA-076] (emphasis added).

[1007] *Cargill*, Award at para. 284 [Exhibit RLA-053]. *See also Glamis Gold* at para. 616 [Exhibit RLA-046] ("It therefore appears that, although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same. The fundamentals of the *Neer* standard thus still apply today.").

[1008] Perú-Canada FTA at Article 805 [Exhibit C-0001] (emphasis added).

to any such rule of customary international law. In its Reply, this failure persists. Absent a foundation in a specific rule of customary international law, Claimant's FET claim cannot stand.

522. In its Counter-Memorial, Respondent explained that absent a *specific* rule of customary international law governing a *specific* type of conduct, States are free to regulate as they deem appropriate.[1009] Establishment of a rule of customary international law requires a factual showing of: "(1) a concordant practice of a number of States acquiesced in by others; (2) and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[1010] The burden is on Claimant to prove the existence of a rule of customary international law that Respondent could have violated.[1011] The *Cargill v. Mexico* tribunal recognized this principle, holding that:

> The burden of establishing any new elements of [customary international law] is on Claimant. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.[1012]

[1009] *See S.S. Lotus (Fr. v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10, at 18-19 [Exhibit RLA-057] (rejecting any implied "[r]estrictions upon the independence of States," and noting that States enjoy "a wide measure of discretion which is only limited in certain cases by prohibitive rules. . .").

[1010] *Glamis Gold* at para. 602 [Exhibit RLA-046] (internal quotations omitted); *see also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Merits)*, I.C.J. REP. 14 (1986), para. 207 [Exhibit RLA-055] ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to settled practice,' but they must be accompanied by the *opinion juris sive necessitates*. Either the States taking such action or the other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'"); *Cargill*, Award at para. 274 [Exhibit RLA-053] ("Consistent and widespread State practice conducted out of a sense of legal obligation would establish the content of customary international law.").

[1011] *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (August 27, 1952) (Judgment) (quoting *Asylum (Colom. v. Perú)*, 1950 I.C.J. 266, 276 (November 20, 1950) (Judgment)) [Exhibit RLA-058] ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.").

[1012] *Cargill*, Award at para. 273 [Exhibit RLA-053].

523. Although the burden rests squarely on its shoulders, Claimant has once again failed to assert a specific rule of customary international law that Respondent violated. In fact, rather than confront this issue head on, Claimant buries its response in a single short footnote. Claimant's entire submission is its footnote 931 stating that:

> MST is the specific rule of international law governing the Parties' conduct and Perú points to no authority that can support its position that proof of 'specific rules' beyond the content of MST is required.[1013]

524. Claimant's terse argument misses the point entirely. Respondent is not asking Claimant to prove anything *beyond* the content of the customary international law MST. Respondent is simply highlighting the fact that Claimant has not proven the content of the customary international law standard, a task that requires evidence of: (1) State practice that is (2) conducted out of a sense of legal obligation. In this case, for example, Claimant would need to establish that customary international law prohibits a state from reconsidering discretionary public interest determinations in light of, *e.g.*, social crisis or evidence of unlawful acts by the investor. Unless and until Claimant does so, its FET claim must fail.

525. Although Claimant does not explicitly say so, it appears that Claimant believes it can rely on prior arbitral decisions to prove customary international law norms.[1014] Not so. Tribunals have repeatedly rejected the proposition that such decisions create customary international law. The *Cargill* tribunal stated plainly that "the awards of international tribunals do not create customary international law."[1015] The *Glamis* tribunal concurred, stating that

[1013] Claimant's Reply, n. 931(internal citations omitted).

[1014] *See* Claimant's Reply, n. 931.

[1015] *Cargill*, Award, at para. 277 [Exhibit RLA-053].

"[a]rbitral awards […] do not constitute State practice and thus cannot create or prove customary international law."[1016]

526. The words of ICJ Judge Shahabuddeen echo *Glamis* and *Cargill*:

> development of customary international law depends on State practice. … It is difficult to regard a decision of the Court [or an international tribunal] as being in itself an expression of State practice. ... A decision made by it is an expression not of the practice of the litigating States, but of the judicial view taken of the relations between them on the basis of legal principles which must necessarily exclude any customary law which has not yet crystallised.[1017]

527. In short, Claimant's allusions to the general MST and recitations of arbitral case law are insufficient. Claimant must (1) identify a specific rule of customary international law; and (2) prove that State practice and *opinio juris* have converged to elevate that rule into the canon of customary international law. Claimant has not done so, and as such, Claimant's FET claim must fail.

3. Claimant's FET Claim Fails Because It Cannot Prove that Respondent's Actions Fell Below the International Minimum Standard for Fair and Equitable Treatment

528. Claimant's FET claim also fails on the facts. Claimant cannot clear the high evidentiary hurdle necessary to prove a breach of FET under the MST. In the words of *Al Tamimi v. Oman*, Respondent's actions were in no way "egregious" or "flagrant."[1018] This alone is sufficient for the Tribunal to reject Claimant's FET claim. Claimant's factual discussion focuses on two types of alleged FET violations. Claimant, it appears, hopes to show that: (i)

[1016] *Glamis Gold* at para. 605 [Exhibit RLA-046]. *See also* Robert Cryer, *Of Custom, Treaties, Scholars, and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 252 (2006) [Exhibit RLA-078].

[1017] Mohamed Shahabuddeen, PRECEDENT IN THE WORLD COURT 71-72 (1997) [Exhibit RLA-079].

[1018] *Adel A Hamadi*, Award at para. 390 [Exhibit RLA-076].

Respondent's actions frustrated Claimant's legitimate expectations; and (ii) Respondent's actions were arbitrary.[1019] Even if Claimant had identified and proven the existence of customary international law rules protecting legitimate expectations and guaranteeing non-arbitrary treatment (which, as noted above, it did not), these arguments would still fail on the facts.

529. Below, Respondent will demonstrate that the alleged expectations Claimant says it held were by no means legitimate (Section a below); and that Respondent's actions—far from arbitrary—were rational and appropriate policy choices, adopted without violating Claimant's due process rights (Section b below).

a. Respondent's actions did not violate any legitimate expectation Claimant may have had

530. In its analysis of legitimate expectations, after an extensive review of arbitral awards, the *National Grid v. Argentina* tribunal concluded that the protection of a claimant's expectations:

> has been made subject to two significant qualifications: first, that the investor should not be shielded from the ordinary business risk of the investment and, second, that the investor's expectations must have been reasonable and legitimate in the context in which the investment was made.[1020]

531. In this case, Claimant asserts that it had a "legitimate expectation that it would be *permitted to mine* the Santa Ana Concession…."[1021] If that was indeed Claimant's expectation—

[1019] Claimant's Reply at paras. 359, 361, 364, 366 and 372.

[1020] *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, November 3, 2008 ("*National Grid*, Award"), para. 175 [Exhibit CL-0081]. *See also LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 130 [Exhibit CL-0089] (holding that "the investor's fair expectations cannot fail to consider parameters such business risk or industry's regular patterns."); *Saluka v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 ("*Saluka*, Partial Award"), para. 304 [Exhibit CL-0091] ("the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness *in light of the circumstances*.") (emphasis in original).

[1021] Claimant's Reply at para. 359.

that it was entitled "to mine" and that Perú had to permit it to do so—it reflects at best the naïve optimism of an inexperienced junior mining company with only exploration, not operating, experience. It is not an expectation with any "reasonable" foundation. Claimant's alleged expectations were not legitimate for at least three reasons.

532. *First*, given the illegal manner in which Claimant obtained its rights at Santa Ana, Claimant had no reasonable or legitimate basis to expect Perú to honor its investment indefinitely. To the contrary, Claimant should have expected Perú to rescind its rights at Santa Ana once it uncovered Claimant's scheme to circumvent Perú's constitutional restrictions on border zone investments.

533. *Second*, Claimant had no reasonable or legitimate basis to assume that its special permission to hold concession rights in Perú's border zone was perpetual or could not be revisited under dramatically changed circumstances. Perú premised Supreme Decree No. 083 declaring a "public necessity" on the fact that "the promotion of investments in the mining activity is of national interest."[1022] Claimant therefore knew, or should have known, that if Perú's national interest was threatened under changed circumstances, the Government could revoke the Decree. This is precisely what occurred, when in 2011 it became clear that Bear Creek's operations at Santa Ana were inciting protests, paralyzing the Puno region, and endangering the lives of Peruvian citizens.

534. *Third*, Claimant's alleged certainty that it would be "permitted to mine" at Santa Ana ignored "ordinary business risks" in the mining sector.[1023] Before the Government could even consider permitting Claimant to operate a mine, Claimant had to clear a daunting number of regulatory and legal hurdles (discussed further in Section II.H above). Many would-be mining

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[1022] Supreme Decree 083-2007 at 1 [Exhibit C-0004].

[1023] *See National Grid*, Award at para. 175 [Exhibit CL-0081].

projects—even those stewarded by experienced operators—stall in this phase of development. And critically, quite apart from any interaction with or permissions from the Government, Claimant also had to win support (or at least not face objections) from the local communities and had to obtain a social license to operate before the project could advance (discussed further in Section II.C. above). Still other potential mining projects flounder on that basis, even with all necessary government permissions in hand. Given Claimant's and even its management's inexperience in advancing mining projects to production, Claimant had no reason to expect that it would be certain to overcome these substantial business risks. As such, Claimant had no *legitimate* basis to expect to be "permitted to mine" at Santa Ana. It could only legitimately expect to have the opportunity to apply and receive fair consideration for governmental permissions, and to have the opportunity to seek a social license to proceed from the affected communities—it could not legitimately expect that it was entitled to *receive* either form of "permit" to mine, and of course the latter is not in the government's hands in any event.

535. Claimant also argues that Respondent's temporary suspension of the review of Claimant's EIA in May 2011 violated its legitimate expectations.[1024] This suspension, however, could not have violated any "reasonable" expectation that Claimant held regarding Perú's regulatory approval process. Even a neophyte junior company like Claimant knew, or should have known, that the regulatory process for mining projects is complex and prone to delay.[1025] Claimant also should have known that mining is controversial in Perú, particularly within

[1024] *See* Claimant's Reply at para. 361.

[1025] *See* Rodríguez-Mariátegui Report at paras. 107-08 (listing the 40 major permits or authorizations that Bear Creek never obtained for the Santa Ana Project) [Exhibit REX-003]. *See also* Rodríguez-Mariátegui Second Report at paras. 61-64, 108 (discussing the professional discretion accorded to Government authorities to determine whether the requirements for the various permits and authorizations have been met) [Exhibit REX-009].

indigenous populations like the Aymara communities that lived near the proposed Santa Ana project.[1026]

536. Respondent has explained that the EIA review was suspended temporarily in the face of paralyzing social protests against Santa Ana, out of concern that the hostile circumstances would affect the integrity of the review process and so that the review could eventually take place under more calm conditions.[1027] In the circumstances, that suspension also was in Claimant's interest because a grant of the EIA would have started a ticking clock on the project[1028] at a time when Bear Creek could not have had any hope of obtaining the necessary social license from the communities to proceed with it. Quite apart from the reasonableness of Perú's decision, delays of natural resource extraction projects due to community opposition are a common occurrence around the world. The *National Grid* tribunal noted that the legitimate expectations doctrine does not shield investors from these types of "ordinary business risks."[1029] It follows that Perú's decision to suspend the processing of the EIA temporarily in the face of the violent protests against the Santa Ana project could not have frustrated any *legitimate* expectations that Claimant may have held.

537. Finally, Claimant asserts that it held the legitimate expectation that "should any dispute regarding the Concession arise in the future, due process would be followed to resolve

[1026] *See* Rodríguez-Mariátegui Report at para. 63 [Exhibit REX-003]; Rodríguez-Mariátegui Second Report at paras. 109 *et. seq.* (explaining the need to acquire surface rights from property owning communities and individual land possessors, and the potential difficulties that arise during that process) [Exhibit REX-009]. *See also* Ramírez Second Witness Statement at paras. 42-46 (describing the delays experienced by the Tía María and Conga mining projects due to widespread opposition from the local communities) [Exhibit RWS-006].

[1027] Ramírez Second Witness Statement at paras. 38-40 (explaining that the EIA review process was suspended on account of the protests in Puno) [Exhibit RWS-006].

[1028] Rodríguez-Mariátegui Second Report at para. 107 [Exhibit REX-009].

[1029] *National Grid*, Award at para. 175 [Exhibit CL-0081].

any such dispute in accordance with applicable laws."[1030] Respondent agrees that this expectation was reasonable. Claimant never explains, however, how its expectations vis-à-vis dispute settlement have been thwarted. Respondent has explained that the EIA suspension and the issuance of Supreme Decree No. 032 were carried out in accordance with Peruvian law, and therefore consistent with any legitimate expectations Claimant could have held regarding the applicable procedures. Respondent further notes that Claimant: (i) pursued challenges against the government's actions in Peruvian courts; (ii) has never alleged any impropriety in those proceedings; and (iii) is not pursuing a denial of justice claim in this arbitration. What is more, Claimant relies on the analysis of the Peruvian courts repeatedly in its submissions to this Tribunal.[1031] With these facts in mind, it is hard to see how Claimant's expectations regarding dispute resolution could have been frustrated.

538. In sum, Claimant failed to demonstrate that Respondent thwarted any of its alleged expectations that were, in fact, "legitimate." As such, this branch of Claimant's FET claim falls away.

b. <u>Respondent's actions were not arbitrary</u>

539. Claimant also maintains that Respondent failed to accord it FET because Respondent's actions were arbitrary.[1032] However, rather than challenge the substance of the measures, Claimant's arbitrariness argument—it appears—focuses on alleged *procedural*

[1030] Claimant's Reply at para. 359.

[1031] *See, e.g.*, Claimant's Reply at para. 367.

[1032] Claimant's Reply at paras. 364, 366 and 372. Respondent notes that the FTA's explicit carve-outs in Chapter 22 suggest that the Contracting Parties understood that actions taken to protect the lives of their citizens or the State's essential security interests were *not* arbitrary. Those carve-outs state, in part, that:

> "… nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: (a) to protect human, animal or plant life or health …. Nothing in this Agreement shall be construed: … (b) to prevent either Party from taking any actions that it considers necessary for the protection of its essential security interests…"

Perú-Canada FTA, Articles 2201(3) and 2202 [Exhibit C-0001].

deficiencies.[1033] As with all claims under the MST, an allegation of arbitrariness based on procedural shortcomings faces a high burden. According to *Cargill*, State action breaches the MST when it is:

> arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an *unexpected and shocking repudiation of a policy's very purpose* and goals, or to otherwise *grossly subvert a domestic law or policy* for an ulterior motive; or involve[s] an *utter lack of due process so as to offend judicial propriety*.[1034]

540. Claimant calls the revocation of Decree 083: "an arbitrary act that is grossly unfair and unjust because … it expropriated Bear Creek's multi-million dollar investment without notice or an opportunity to be heard."[1035] Respondent recognizes that Claimant might have appreciated advanced "notice" and an "opportunity to be heard," but that preference does not *entitle* Claimant to those courtesies as a matter of customary international law. Claimant cites no case—let alone the necessary proof of State practice and *opinio juris*—to demonstrate otherwise.

541. Claimant references *Metalclad* for the proposition that a failure to provide notice and an opportunity to be heard can breach the MST, but Claimant misrepresents that tribunal's holding.[1036] While the *Metalclad* tribunal noted that the permit in that case was denied "at a meeting of the Municipal Town Council of which Metalclad received no notice, to which it received no invitation, and at which it was given no opportunity to appear,"[1037] the tribunal's findings did not turn on those facts, or on any analysis of arbitrariness. *Metalclad* is a case about

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[1033] Claimant's Reply at para. 364 and 372.

[1034] *Cargill*, Award at para. 296 [Exhibit RLA-053].

[1035] Claimant's Reply at para. 364.

[1036] Claimant's Reply at para. 365.

[1037] *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 ("*Metalclad* Award"), para. 91 [Exhibit CL-0105].

legitimate expectations. Specifically, *Metalclad* focused on expectations derived from Mexico's direct assurances to the investor that it needed no further permits to operate its landfill.[1038] Mexico frustrated these expectations when, after construction of the landfill was "virtually complete," the local municipality denied a subsequent permit, preventing the project from moving forward.[1039] As Professor Salacuse noted in his treatise, the *Metalclad* tribunal held that "the investor was entitled to rely on the representations of the federal officials and *therefore* Mexico had violated the fair and equitable treatment standard… ."[1040] As Professor Salacuse confirms, the *Metalclad* decision turned on legitimate expectations, not procedural inadequacies and arbitrariness.

542. Claimant also cites *Bilcon v. Canada*, but it too is not a case about inadequate "notice" or lack of an "opportunity to be heard."[1041] Rather than procedural shortcomings, the *Bilcon* tribunal found a breach of the MST because the claimant had a legitimate expectation that Canada would decide its permit application based on "environmental soundness," but instead, Canada denied the permit due to conflicts with "community core values."[1042] Thus, the *Bilcon* award (like *Metalclad*), turned on legitimate expectations. It follows that these decisions are not germane to an arbitrariness analysis.

543. Although neither *Metalclad* nor *Bilcon* is particularly relevant, it is noteworthy that both cases concern public hearings, during which it is customary for applicants to appear, present their projects, and engage in discussion. In the case at hand, there was no public forum that Bear Creek could have joined to contest the issuance of Supreme Decree No. 032 or

[1038] *Metalclad*, Award at paras. 85 *et seq.* [Exhibit CL-0105].

[1039] *Metalclad*, Award at paras. 85-90 [Exhibit CL-0105].

[1040] Jeswald W. Salacuse, THE LAW OF INVESTMENT TREATIES 238 (2010) [Exhibit RLA-039*bis*] (emphasis added).

[1041] Claimant's Reply at paras. 370-372.

[1042] *Bilcon,* Award at paras. 447-454 [Exhibit CL-0190].

Supreme Decree No. 083 before it of which Claimant is much enamored. Supreme Decree No. 032 was issued by Perú's Council of Ministers, the nation's highest executive body, based on deliberations over whether Santa Ana continued to be a "public necessity" in light of the social crisis in Puno and Bear Creek's apparent violation of the constitution in securing the original public necessity declaration.

544. As such, it is unclear what specific "due process" Claimant asserts it was denied. Does Claimant believe it was legally entitled to receive an invitation to the high-level meetings where Government officials debated options for quelling the protests? Claimant cannot really have expected to be a participant in such discretionary, high-level deliberations at the Council of Ministers; that is not part of the process for any Supreme Decree, much less one issued under conditions of ongoing social crisis. And how much advance "notice" does Claimant believe it deserved under customary international law? A week? Six months? Claimant does not say. Without a concrete benchmark for the specific "due process" Claimant thinks it should have received—and absent any legal support for its argument—Claimant's arbitrariness claim cannot stand.

545. Although the cases Claimant cites are inapposite, the procedural facts before this Tribunal are similar to those examined in *Genin v. Estonia*, a case Respondent cited in its Counter-Memorial (which Claimant did not address in its Reply).[1043] In *Genin*, the respondent revoked the Estonian Innovation Bank's ("EIB") bank license. Like Claimant here, EIB received no formal notice of the revocation, no invitation to attend the Government session discussing the revocation, and no chance to challenge the decision prior to the revocation's issuance.[1044] The claimant in *Genin* asserted that these actions breached the international minimum standard of

[1043] Respondent's Counter-Memorial at paras. 288 *et seq*.

[1044] *Genin*, Award at paras. 363-365 [Exhibit RLA-054].

treatment.[1045] The tribunal disagreed. Although it expressed its "hope" that the respondent would show "greater caution regarding procedure in the future,"[1046] the tribunal held that the respondent's actions did not violate the MST.[1047] This Tribunal should adopt a similar approach, and reject Claimant's FET claims.

546. As the discussion above makes clear, there was nothing unfair or inequitable about the measures Respondent enacted. Thus, under any standard of FET, Claimant cannot prove its factual case. As such, Claimant's attempt to import a more favorable, autonomous FET standard is not just meritless (as we explain below), it is also, in the end, irrelevant. Even if Claimant could somehow convince the Tribunal to adopt an autonomous standard, the outcome of the FET analysis would not change.

4. Claimant Cannot Import an Autonomous FET Standard Into the FTA

547. Faced with the reality that it cannot hope to demonstrate an FET breach under the MST, Claimant reasserts—albeit halfheartedly—its argument that it may import a more favorable autonomous FET standard via the Treaty's most-favored nation ("MFN") clause. Claimant's quiet retreat from the position that it can poach an autonomous FET standard from another treaty is apparent from a review of Claimant's pleadings. In the FET section of its Memorial, Claimant spent just three pages discussing the MST,[1048] but more than 10 pages analyzing in detail the contours of the autonomous FET standard.[1049] In its Reply, however—

[1045] *Genin*, Award at paras. 1-3 [Exhibit RLA-054].

[1046] *Genin*, Award at para. 372 [Exhibit RLA-054].

[1047] *Genin*, Award at paras. 316-17, 365, 373 [Exhibit RLA-054].

[1048] Claimant's Memorial at paras. 146-153.

[1049] Claimant's Memorial at paras. 154-175.

after Respondent explained that Claimant was focusing on the wrong standard[1050]—Claimant reversed course, spending a full 14 pages examining FET under the MST,[1051] but just five pages addressing the autonomous standard.[1052] Implicit in this shift in emphasis is a recognition that the international minimum standard for FET, and that standard alone, applies in this dispute.

548. Respondent reiterates below the arguments that prompted Claimant to back away from its original position. Specifically, Respondent explains that Claimant cannot import an autonomous FET standard because: (i) the FTA excludes pre-existing treaties from the scope of its MFN clause ; and (ii) doing so would conflict with the express will of the contracting parties.

a. Claimant cannot import an autonomous FET standard because the FTA excludes pre-existing obligations from the scope of its most-favored nation clause

549. In its Counter-Memorial, Respondent explained that Claimant cannot import an autonomous FET standard, because autonomous FET standards only appear in treaties Perú signed *prior to* the FTA, and Perú exempted pre-existing treaty obligations from the FTA's MFN clause.[1053] In its Reply, Claimant does its best to muddy the waters, but fails to refute Respondent's straightforward reading of the Treaty.

550. The specific MFN reservation at issue reads:

> Perú reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.[1054]

[1050] Respondent's Counter-Memorial at paras. 292 *et seq.*

[1051] Claimant's Reply at paras. 332-380. Claimant also cited only cases involving the MST (as opposed to an autonomous standard) in the factual application section of its Reply. Claimant's Reply at paras. 363 *et seq*.

[1052] Claimant's Reply at paras. 393-401.

[1053] Respondent's Counter-Memorial at paras. 292 *et seq. See also* Annex II to Perú-Canada FTA, Perú's First Reservation [Exhibit R-056].

[1054] Annex II to Perú-Canada FTA, Perú's First Reservation [Exhibit R-056].

551. Through this language, Perú excluded from the ambit of the FTA's MFN clause: (1) "measure[s] that accord[] differential treatment" under (2) "any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of [the FTA]."[1055] The FTA defines "measures" as "any law, regulation, procedure, requirement or practice."[1056] It follows that Perú's reservation excludes the "requirement[s] or practice[s]" under pre-existing international agreements from the FTA's MFN clause. This would include, *inter alia*, any "requirement" to provide, or "practice" of providing, an autonomous standard of FET under a pre-existing BIT. Thus, Claimant cannot leverage the Treaty's MFN clause to import an autonomous FET standard from a treaty that pre-dates this 2009 FTA. Perú has not signed a single investment treaty that: (1) post-dates the 2009 Perú-Canada FTA; and (2) includes an autonomous FET standard. This leaves Claimant with no autonomous FET provision to import.

552. Claimant's convoluted counterargument centers on an inconsequential semantic distinction.[1057] Specifically, Claimant seizes upon the difference in the wording of the MFN clause, which protects investors from less favorable "treatment," and Perú's MFN reservation, which excludes "measure[s] that accord[] treatment".[1058] Claimant says that because Perú's MFN reservation relates to "measures that accord treatment" instead of simply "treatment", the reservation does not apply to standards of protection in other treaties.

553. Claimant succeeds only in highlighting a distinction without a difference. Any "treatment" that the Peruvian Government might provide is, of course, necessarily directly tied to

[1055] Annex II to Perú-Canada FTA, Perú's First Reservation [Exhibit R-056].

[1056] Perú-Canada FTA at Article 105 [Exhibit R-390].

[1057] Claimant's Reply at paras. 390 *et seq.*

[1058] Perú-Canada FTA at Article 804 [Exhibit C-0001]; Annex II to Perú-Canada FTA, Perú's First Reservation [Exhibit R-056].

a "measure"—*i.e.*, a "law, regulation, procedure, requirement or practice,"[1059]—that accords that treatment. In this case, the more favorable "treatment" Claimant seeks to import is FET in accordance with the autonomous standard, and the "measures" that accord that treatment are the FET clauses in certain of Perú's BITs that pre-date the FTA. Claimant hopes to import one of these FET clauses into the FTA, but Perú specifically and unambiguously carved out this type of "measure that accords [] treatment" from the FTA's MFN clause. The Tribunal must, therefore, reject Claimant's effort to sidestep Perú's MFN reservation.

554. Claimant's invocation of the Perú-Canada BIT does nothing to advance its case; it serves only to underscore the illogic of Claimant's position.[1060] Claimant argues that the Perú-Canada BIT's reservation excluding pre-existing treaties from the MFN clause (which refers to "treatment"), cannot have the same effect as the Perú-Canada FTA's MFN reservation (which refers to "measure[s] that accord[] treatment"), because the provisions use different language.[1061] Claimant relies on this semantic distinction to conclude that Perú and Canada excluded the importation of standards of treatment from pre-existing treaties in their BIT, but did not do so in their FTA.[1062] Respondent disagrees. Respondent understands that *both* the BIT and the FTA exclude the importation of more favorable standards from pre-existing treaties.

555. To state it differently, Claimant and Respondent agree that when the Perú-Canada BIT entered into force on June 20, 2007, the express policy of Canada and Perú was to prohibit the importation of more favorable standards from pre-existing treaties.[1063] Claimant and

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[1059] Perú-Canada FTA at Article 105 [Exhibit C-0001].

[1060] Claimant's Reply at para. 391.

[1061] Claimant's Reply at para. 391.

[1062] Claimant's Reply at para. 392.

[1063] Agreement Between Canada and The Republic of Perú for the Promotion and Protection of Investments ("Canada-Perú BIT"), Article 9(3) and Annex III(1) [Exhibit C-0247].

Respondent only disagree on whether Perú and Canada completely reversed that policy just 11 months later, when they signed the FTA on May 29, 2008. Respondent's position is that when Perú and Canada signed the BIT, they agreed to exclude pre-existing treaties from the MFN clause, and when those same Parties signed the FTA less than a year after the BIT entered into force, they agreed to the same approach. In other words, Respondent's position is that the Perú-Canada BIT and the Perú-Canada FTA are consistent.

556. Claimant's position is that when Perú and Canada signed the BIT, they agreed to exclude pre-existing treaties from the MFN clause, but when those same Parties signed the FTA shortly thereafter, they decided that importing standards from pre-existing treaties was perfectly acceptable. That would have been inconsistent with the practice of most other states at the time, in that BIT and FTA parties are typically working to tighten limitations on MFN clauses in recent agreements, not loosen them. But more damning is the fact that Claimant's position is that the Perú-Canada BIT and the Perú-Canada FTA—international agreements covering (in this respect) the same subject area, negotiated by the same parties, at essentially the same time—are *in*consistent. With respect, this is absurd.

557. Claimant's position is also at odds with statements the Canadian Government issued during its FTA negotiations with Perú. In these statements, Canada was clear that the investment chapter of the forthcoming Perú-Canada FTA would be consistent with the recently concluded Perú-Canada BIT. For instance:

- In June 2007, in an economic analysis of the potential FTAs with Colombia and Perú, Canada stated that: "Canada's goal would be to negotiate a high standard investment chapter in an FTA which would be based on the Canada-Perú [BIT]."[1064]

[1064] An FTA with the Andean Community countries of Colombia and Perú: Qualitative Economic Analysis, June 2007, *available at*: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Perú-perou/FTA-ALE-and.aspx?lang=eng [Exhibit R-298].

- In January 2008, in an assessment report regarding the free trade negotiations with Perú and other Andean countries, Canada stated that: "[t]he Investment Chapter of Canada-Andean FTAs [including the Perú-Canada FTA] is expected to closely follow the Canada-Perú [BIT]."[1065]

558. For all of these reasons—because it conflicts with a plain reading of the Treaty, because it conflicts with Canada's statements at the time, and because it conflicts with basic logic—the Tribunal should reject Claimant's tortured reading of the FTA. Instead, the Tribunal must enforce the clear intent of the Treaty's signatories, and reject Claimant's attempt to import a more favorable FET standard from a pre-existing treaty.

b. Claimant cannot import an autonomous FET standard because doing so would conflict with the will of the Contracting Parties

559. In its Counter-Memorial, Respondent explained that even if Perú had not specifically excluded pre-existing treaties from the FTA's MFN clause (which it did), Claimant's effort to import an autonomous FET standard would nonetheless fail based on the plain intent of the parties to the FTA.[1066] Respondent demonstrated that, when Perú and Canada negotiated the FTA, they specifically and purposefully agreed in Article 805 to limit their FET obligations to the minimum standard of treatment, and that this choice was consistent with a broader change in Perú's treaty practice that began after 2000.[1067] Respondent included the following detailed chart, which demonstrated that Perú made a policy decision—long before it negotiated the FTA—to no longer extend FET guarantees based on the autonomous standard:

[1065] Canada – Andean Community Free Trade Negotiations, Initial Environmental Assessment Report, January 2008, *available at*: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/Perú-perou/ea-andean-andine.aspx?lang=eng [Exhibit R-299].

[1066] Respondent's Counter-Memorial at paras. 298 *et seq*.

[1067] Respondent's Counter-Memorial at para. 298.

Date treaty signed[1068]	Treaty	FET Standard
January 30, 1995	Perú-Germany BIT	Autonomous (Art. 2(1))
March 10, 1995	Perú-Norway BIT	Autonomous (Art. 4(1))
May 2, 1995	Perú-Finland BIT	Autonomous (Art. 2(2))
October 13, 1995	Perú-Malaysia BIT	Autonomous (Art. 2(2))
December 7, 1995	Perú-Australia BIT	Autonomous (Art. 3(2))
June 13, 1996	Perú-El Salvador BIT	Autonomous (Art. 4(1))
April 7, 1999	Perú-Ecuador BIT	Autonomous (Art. 3(1))
October 10, 2000	Perú-Cuba BIT	Autonomous (Art. 3(1))
Change in Perú's treaty practice		
October 12, 2005	Perú-BLEU BIT	International minimum (Art. 3)
April 4, 2006	Perú-U.S. FTA	International minimum (Art. 10.5)
August 22, 2006	Perú-Chile FTA	International minimum (Art. 11.4)
November 14, 2006	Perú-Canada BIT	International minimum (Art. 5)
November 12, 2007	Perú-Colombia BIT	International minimum (Art. 4)
May 29, 2008	Perú-Singapore FTA	International minimum (Art. 10.5)
May 29, 2008	Perú-Canada FTA	International minimum (Art. 805)
November 22, 2008	Perú-Japan BIT	International minimum (Art. 5)
April 28, 2009	Perú-China FTA	International minimum (Art. 132)

560. Finally, Respondent explained that despite Perú's clear policy change, and the unambiguous language in the FTA (which reflects Perú's current approach to FET), Claimant sought to exploit the MFN clause to transform the FTA's FET clause into a pre-2001 Peruvian FET clause (which reflects an approach that Perú abandoned long ago). Respondent observed that if successful, Claimant's approach would render meaningless the clear and deliberate shift in Perú's treaty practice in the early 2000s. This could not have been Perú's intention when it signed the FTA.[1069]

[1068] UNCTAD List of Bilateral Investment Treaties to which Perú is a Party, *available at*: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu [Exhibit R-088].

[1069] Respondent also explained that Canada shares Perú's understanding as demonstrated in the NAFTA interpretive note that Canada signed, and a submission to the *Pope & Talbot* tribunal by Meg Kinnear. Respondent's Counter-Memorial, paras. 301 *et seq.*; NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, Art. B(2), *available at* http://www.state.gov/documents/organization/38790.pdf [Exhibit R-131]; Letter from Meg Kinnear, General Counsel, Trade Law Division, Canada, to *Pope & Talbot* Tribunal, October 1, 2001, at 3 [Exhibit R-132].

561. In its Reply, Claimant offered no response to these arguments. The Tribunal can draw its own conclusions, but one would assume that if Claimant had a strong—or even a colorable—counterargument, Claimant would have included it in the Reply.

562. Instead, Claimant has not attempted to challenge the fact that the Contracting Parties to the FTA obviously intended—as stated in Article 805, titled "Minimum Standard of Treatment"—to guarantee FET only up to the MST under international law. The Tribunal must enforce the will of the Contracting Parties, and reject Claimant's attempt to import a more favorable standard. This leaves Claimant to pursue its FET claim under the MST, which presents a high hurdle Claimant cannot hope to overcome.

C. RESPONDENT DID NOT VIOLATE OTHER PROVISIONS OF THE FTA

563. Following lengthy submissions on expropriation and FET, Claimant once again tacks on very brief claims related to full protection and security ("FPS") and unreasonable and discriminatory measures ("UDM").[1070] Claimant's submission on these issues is remarkable not just for its brevity, but also for its complete failure to respond to Respondent's arguments. In fact, Claimant does not include a single reference to Respondent's Counter-Memorial in the FPS/UDM section of its Reply. Given that the arguments Respondent developed in its Counter-Memorial stand unchallenged, the discussion that follows regarding Claimant's FPS claim and Claimant's UDM claim will be brief.

1. Respondent Afforded Claimant Full Protection and Security in Accordance with the FTA

564. In its Counter-Memorial, Respondent explained that Claimant's FPS claim was baseless because: (i) Claimant cannot use the FTA's MFN clause to import a more favorable,

[1070] Claimant's Reply at paras. 402 *et seq*.

autonomous FPS standard;[1071] and (ii) the FTA's FPS provision does not guarantee "legal security."[1072] Claimant has failed to engage with—let alone refute—these arguments.

a. <u>Claimant cannot import an autonomous FPS standard because the FTA excludes pre-existing obligations from the scope of its most-favored nation clause</u>

565. As Respondent's Counter-Memorial explained, for the reasons discussed in Section B.4 above with respect to Claimant's efforts to use the Treaty's MFN clause to import an autonomous FET clause,[1073] Claimant likewise cannot use the Treaty's MFN clause to import an autonomous FPS standard because Perú specifically excluded pre-existing agreements from the scope of the MFN clause.[1074] Thus, Claimant cannot import standards from treaties signed before the FTA came into force on August 1, 2009.[1075] Claimant ignores this argument, and proceeds to recite and rely upon the same list of treaties in its Reply that it invoked in its Memorial,[1076] even though each of those agreements was signed and entered into force long before August 1, 2009 (as shown in the table below):

[1071] Respondent's Counter-Memorial at paras. 307-308.

[1072] Respondent's Counter-Memorial at paras. 309-313.

[1073] *See also* Respondent's Counter-Memorial, Section IV(B)(4).

[1074] Annex II to Perú-Canada FTA, Perú's First Reservation [Exhibit R-056].

[1075] Respondent's Counter-Memorial at para. 307.

[1076] *Cf.* Claimant's Memorial at para. 156 and Claimant's Reply, n.1054.

Treaty Claimant cited[1077]	Date signed[1078]	Date entered into force[1079]
Perú-Czech Republic	March 16, 1994	March 6, 1995
Perú-Denmark	November 23, 1994	February 17, 1995
Perú-France	October 6, 1993	May 30, 1996
Perú-Germany	January 30, 1995	May 1, 1997
Perú-Malaysia	October 13, 1995	December 25, 1995
Perú-Netherlands	December 27, 1994	February 1, 1996
Perú-United Kingdom	October 4, 1993	April 21, 1994

566. These pre-existing treaties do not help Claimant. Neither do the 10 international investment agreements that Perú signed after the Perú-Canada FTA entered into force, because each of those agreements, like Article 805 of the Perú-Canada FTA, limits FPS to the minimum standard of treatment.[1080] Thus, for the same reasons Respondent outlined in its Counter-Memorial—reasons Claimant has failed to refute—Claimant cannot import an autonomous FPS standard from any Peruvian treaty.

b. Claimant's FPS claim fails because customary international law does not guarantee "legal security"

567. Article 805 unambiguously limits FPS protection to the minimum standard of treatment under customary international law:

[1077] Claimant's Memorial at para. 183 and n. 454; Claimant's Reply, n.1054.

[1078] UNCTAD List of Bilateral Investment Treaties to which Perú is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu [Exhibit R-088].

[1079] UNCTAD List of Bilateral Investment Treaties to which Perú is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu [Exhibit R-088].

[1080] *See* Free Trade Agreement Between Perú and the European Free Trade Association States, signed on July 14, 2010 [Exhibit R-090] (includes no guarantee of full protection and security for foreign investors); Free Trade Agreement Between Perú and Korea, signed on November 14, 2010, Article 9.5 [Exhibit R-092]; Free Trade Agreement Between Perú and Mexico, signed on April 6, 2011, Article 11(6) [Exhibit R-101]; Free Trade Agreement Between Perú and Costa Rica, signed on May 21, 2011, Article 12.4 [Exhibit R-125]; Free Trade Agreement Between Perú and Panama, signed on May 25, 2011, Article 12.4. [Exhibit R-126]; Free Trade Agreement Between Perú and Japan, signed on May 31, 2011 (includes no guarantee of full protection and security for foreign investors) [Exhibit R-127]; Free Trade Agreement Between Perú and Guatemala, signed on June 12, 2011, Article 12.4. [Exhibit R-128]; Free Trade Agreement Between Perú, Colombia and the EU, signed on June 26, 2012 [Exhibit R-129] (includes no guarantee of full protection and security for foreign investors); Additional Protocol to the Pacific Alliance Framework Agreement, signed on February 10, 2014, Article 10.6. [Exhibit R-130].

Article 805: Minimum Standard of Treatment

> 1. Each Party shall accord to covered investments treatment <u>in accordance with the customary international law minimum</u> standard of treatment of aliens, including fair and equitable treatment and <u>full protection and security</u>.[1081]

568. Respondent explained that to assert a breach of the MST for FPS, Claimant must identify and substantiate a rule of customary international law that Respondent allegedly violated.[1082] To prove that such a rule exists, Claimant must demonstrate: "(1) a concordant practice of a number of States acquiesced in by others; (2) and a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)."[1083]

569. Respondent explained that Claimant failed to make such a showing in its Memorial.[1084] Specifically, Respondent argued that Claimant did not prove that State practice and *opinio juris* has converged such that "legal security"—upon which Claimant bases its FPS claim[1085]—has become a part of customary international law.[1086] Respondent also criticized Claimant's Memorial for its failure to cite any jurisprudence addressing FPS in the context of the MST.[1087]

[1081] Perú-Canada FTA at Article 805(1) [Exhibit C-0001] (emphasis added).

[1082] Respondent's Counter-Memorial at para. 310 *et seq*. *See also Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, 1952 I.C.J. 176, 200 (August 27, 1952) (Judgment) (quoting *Asylum (Colom. v. Perú)*, 1950 I.C.J. 266, 276 (November 20, 1950) (Judgment)) [Exhibit RLA-058] ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.").

[1083] *Glamis Gold* at para. 602 [Exhibit RLA-046] (internal quotations omitted); *see also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Merits)*, 1986 I.C.J. REP. 14 (June 27), at para. 207 [Exhibit RLA-055] ("[F]or a new customary rule to be formed, not only must the acts concerned 'amount to a settled practice,' but they must be accompanied by the *opinio juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'").

[1084] Respondent's Counter-Memorial at para. 310.

[1085] Claimant's Memorial at paras. 186-187; Claimant's Reply at paras. 404, 405 and 408.

[1086] Respondent's Counter-Memorial at para. 311.

[1087] Respondent's Counter-Memorial at para. 312.

570. Claimant could muster no response to these arguments. In its Reply, Claimant offers no evidence of State practice regarding "legal security," let alone sources indicating that States provide "legal security" out of a sense of legal obligation. More surprisingly perhaps, Claimant once again failed to cite a single case analyzing FPS under the international minimum standard.[1088] In short, in both its Memorial and its Reply, Claimant failed to meet its burden of establishing a specific FPS standard under customary international law that Respondent arguably breached. Absent such a showing, Claimant's FPS claim fails.

571. Moreover, it is by no means clear that even an autonomous FPS standard would embrace Claimant's claims of "legal security" against government changes in the application of the law, even if Claimant could import one. While Claimant cites a handful of cases that

[1088] Claimant's Reply cites the following cases, none of which concerns FPS provisions based on the international minimum standard: *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007 [Exhibit CL-0031] (*see* Agreement Between the Federal Republic of Germany and the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, signed April 9, 1991, November 8, 1993 at Art. 4(1) [Exhibit R-176]); *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 30 LL.M 580 (1991) [Exhibit CL-0036] (*see* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka, signed February 13, 1980, February 13, 1980, at Art 2(2) [Exhibit R-133]); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, December 1, 2011 [Exhibit CL-0086] (*see* Agreement Between the Government of the Hellenic Republic and the Government of Romania for the Promotion and Reciprocal Protection of Investments, signed September 16, 1991, September 16, 1991, *at* Art. 2(2) [Exhibit R-134]); *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, November 12, 2010 [Exhibit CL-0101] (*see* Agreement Between Canada and the Czech Republic for the Promotion and Protection of Investments, signed May 6, 2009, January 22, 2012, at Art. 3(1) [Exhibit R-135]); *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 [Exhibit CL-0107] (*see* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania, signed January 7, 1994, August 2, 1996*, at* Art. 2(2) [Exhibit R-136]); *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006 [Exhibit CL-0082] (*see* Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991, October 20, 1994, at Art. 2(2) [Exhibit R-137]); *CME v. Czech Republic*, UNCITRAL, Partial Award, September 13, 2001 [Exhibit CL-0103] (*see* Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, signed April 29, 1991, October 1, 1992 at Art. 3(2) [Exhibit R-138]); and *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989 [Exhibit CL-0122] (*see* Treaty of Friendship, Commerce, and Navigation Between the United States of America and the Italian Republic, signed February 2, 1948, July 26, 1949, at Art. 5(1) [Exhibit R-139]); *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997 [Exhibit RLA-056] (*see* Treaty Between the United States of America and the Republic of Zaire Concerning the Reciprocal Encouragement and Protection of Investment, signed August 3, 1984, at Art. II(4) [Exhibit R-300]).

consider such an expansion of FPS,[1089] many tribunals have rejected that type of innovation in the FPS standard. For instance, the *Suez v. Argentina* tribunal noted that:

> this Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm.[1090]

572. Similarly, the *Gold Reserve* tribunal, while acknowledging that "some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections," held that "the more traditional, and commonly accepted view … is that this standard of treatment refers to protection against physical harm to persons and property."[1091]

573. More to the point, Claimant has not, in any event, been deprived of legal security, because Supreme Decree No. 32 was a reflection of the same broad discretionary authority under the Peruvian Constitution of the highest body of the Peruvian state to consider its own "public necessity" that gave rise to the original Supreme Decree No. 83, and Claimant had no claim to "security" under Peruvian law that that discretionary determination could never be revisited.

[1089] Claimant's Memorial at para. 186; Claimant's Reply at para. 404.

[1090] *Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, July 30, 2010, para. 167 [Exhibit CL-0102]. *See also Saluka,* Partial Award at paras. 483-484 [Exhibit CL-0091] ("The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence... the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."); *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007, para. 258 [Exhibit CL-0088] (holding that the full protection and security standard was developed in the context of physical security and that "only exceptionally will it be related to the broader ambit" of legal security).

[1091] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, para. 622 [Exhibit CL-0063].

2. The FTA Contains No Unreasonable or Discriminatory Measures Clause, and Claimant Cannot Import Such a Clause from Another Treaty

574. Finally, Respondent's Counter-Memorial also explained that: (i) the FTA does not include a stand-alone UDM Clause and (ii) Claimant cannot manufacture UDM protection by invoking the MFN clause.[1092] Again, for the reasons explained in Section B.4 above,[1093] the MFN clause does not apply to protections in treaties signed before the Perú-Canada FTA entered into force on August 1, 2009. As Respondent pointed out in its Counter-Memorial,[1094] each of the treaties Claimant relies upon for its UDM claim was signed and entered into force well before August 1, 2009 (as shown below):

Treaty Claimant cited[1095]	Date signed[1096]	Date entered into force[1097]
Perú-Argentina	November 10, 1994	October 24, 1996
Perú-Bolivia	July 30, 1993	March 19, 1995
Perú-Cuba	October 10, 2000	November 25, 2001
Perú-Denmark	November 23, 1994	February 17, 1995
Perú-Ecuador	April 7, 1999	December 9, 1999
Perú-Finland	May 2, 1995	June 14, 1996
Perú-Germany	January 30, 1995	May 1, 1997
Perú-Italy	May 5, 1994	October 18, 1995
Perú-Netherlands	December 27, 1994	February 1, 1996
Perú-Paraguay	February 1, 1994	December 18, 1994
Perú-Spain	November 17, 1994	February 16, 1996
Perú-Sweden	May 3, 1994	August 1, 1994
Perú-Switzerland	November 22, 1991	November 23, 1993
Perú-United Kingdom	October 4, 1993	April 21, 1994
Perú-Venezuela	January 12, 1996	September 18, 1997

[1092] Respondent's Counter-Memorial at para. 314.

[1093] *See also* Respondent's Counter-Memorial at Section IV(B)(4).

[1094] Respondent's Counter-Memorial at para. 314.

[1095] Claimant's Memorial at para. 184 and n. 455; Claimant's Reply, n.1055.

[1096] UNCTAD List of Bilateral Investment Treaties to which Perú is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu [Exhibit R-088].

[1097] UNCTAD List of Bilateral Investment Treaties to which Perú is a Party, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/165#iiaInnerMenu [Exhibit R-088].

575. Finally, Respondent explained that the 10 investment agreements Perú signed after the FTA entered into force, none of which includes a UDM provision, cannot assist Claimant.[1098]

576. Once again, Claimant responded with silence, offering no refutation of Respondent's arguments, and providing no additional source(s) from which to derive UDM protection. As such, Claimant's UDM claim—like its other substantive claims—must fail.

V. CLAIMANT'S DAMAGES CLAIM REMAINS INFLATED, INACCURATE, AND FUNDAMENTALLY INAPPROPRIATE

577. In the previous Section, Respondent demonstrated that it did not breach the FTA. It follows that Claimant has no entitlement to damages in these proceedings. If, however, the Tribunal somehow reaches a quantum analysis, it must reject Claimant's damages calculations. It appears that Claimant and its experts approached the task of valuation with a singular focus: maximizing Claimant's damages. This endeavor starts with a dubious cash flow-based calculation for Santa Ana—an unbuilt, unpermitted project that never advanced beyond the early planning stages. Claimant adds to that a wholly unsubstantiated claim for knock-on damages to Corani—a separate unbuilt, unpermitted project that Bear Creek's CEO repeatedly has confirmed was "unaffected" by Respondent's measures.[1099] Claimant's experts take these speculative inputs, apply unsupported assumptions, adopt inconsistent methodologies, and manufacture a

[1098] Respondent's Counter-Memorial, para. 315. *See also* Free Trade Agreement Between Perú and the European Free Trade Association States, signed on July 14, 2010 [Exhibit R-090]; Free Trade Agreement Between Perú and Korea, signed on November 14, 2010 [Exhibit R-092]; Free Trade Agreement Between Perú and Mexico, signed on April 6, 2011 [Exhibit R-101]; Free Trade Agreement Between Perú and Costa Rica, signed on May 21, 2011 [Exhibit R-125]; Free Trade Agreement Between Perú and Panama, signed on May 25, 2011 [Exhibit R-126]; Free Trade Agreement Between Perú and Japan, signed on May 31, 2011 [Exhibit R-127]; Free Trade Agreement Between Perú and Guatemala, signed on June 12, 2011 [Exhibit R-128]; Free Trade Agreement Between Perú, Colombia and the EU, signed on June 26, 2012 [Exhibit R-129]; Additional Protocol to the Pacific Alliance Framework Agreement, signed on February 10, 2014 [Exhibit R-130].

[1099] Transcript of Bear Creek Mining Corporation "Special Call," June 27, 2011 at 3, 7 [Exhibit R-186].

damages claim in excess of half a *billion* dollars—more than the entire market value of Bear Creek itself at the time of the alleged Treaty violations.

578. As Respondent noted in its Counter-Memorial, awarding damages of this magnitude to Claimant would be particularly absurd because no evidence exists that Claimant could have successfully stewarded the permitting, construction, or operation of either project.[1100] Indeed, Santa Ana would have been Claimant's first-ever attempt to construct or operate a mine. And as Respondent showed in Section II(C) above, even absent the government measures of which Claimant complains, and indeed even if Bear Creek had received key government permits, it could not have proceeded without community support (or at least acquiescence)—which the widespread, violent protests by tens of thousands of community residents in 2011 surely prove that it lacked.

579. Undeterred by never having extracted an ounce of metal from the ground, Bear Creek hopes to extract more than US$520 million from the Peruvian Government in this Arbitration. Indeed, this Treaty claim appears to be one of Bear Creek's principal business activities at present. In its Counter-Memorial, Respondent explained that the Tribunal must reject this effort because Claimant's damages analysis is internally inconsistent, lacks factual foundation, and conflicts with international arbitration jurisprudence.[1101] Claimant failed to refute—and in many cases did not even respond to—Respondent's arguments.

580. For instance, in its Counter-Memorial, Respondent showed that international jurisprudence consistently concludes that damages for non-producing assets like Santa Ana

[1100] Respondent's Counter-Memorial, October 6, 2015, at para. 317.

[1101] Respondent's Counter-Memorial at paras. 316 *et seq*.

cannot exceed the amounts invested.[1102] In response, Respondent did not cite a single case that says otherwise. This issue is discussed further in Section A below.

581. Respondent also explained that even if the Tribunal were inclined to award damages in excess of Claimant's amounts invested (which it should not), it cannot rely on FTI's damages calculations for Santa Ana.[1103] As Professor Graham Davis and The Brattle Group ("Brattle") explained in their First Report,[1104] FTI's discounted cash flow ("DCF") analysis is inappropriate for valuing this type of asset and riddled with errors, almost all of which inflate Claimant's damages. In its Second Report,[1105] Brattle explains that FTI failed to answer its central critiques, and reiterates that FTI's DCF calculation is ill-conceived, inflated, and unreliable. These issues are addressed in more detail in Section B below and in Sections II.B and II.E of Brattle's Second Report.

582. Lastly, Respondent also explained that Claimant failed to prove that Respondent's actions regarding Santa Ana had any lasting impact on the fair market value of Corani.[1106] In doing so, Respondent criticized Claimant's blind and complete reliance on the witness testimony of Mr. Swarthout, an individual with an enormous professional—and financial—stake in the outcome of this Arbitration.[1107] Respondent also noted that Mr. Swarthout's contemporaneous public statements about Corani directly conflict with the testimony he has provided to this Tribunal.[1108] In response, Claimant could not marshal *any* new factual evidence to support Mr.

[1102] Respondent's Counter-Memorial at paras. 321 *et seq*.

[1103] Respondent's Counter-Memorial at paras. 332 *et seq*.

[1104] Expert Report of The Brattle Group, October 6, 2015 ("Brattle First Report") at Section II [Exhibit REX-004].

[1105] Expert Report of The Brattle Group, April 13, 2016 ("Brattle Second Report") at Section II. B and II. E [Exhibit REX-010].

[1106] Respondent's Counter-Memorial at paras. 367 *et seq*.

[1107] Respondent's Counter-Memorial at paras. 379 *et seq*.

[1108] Respondent's Counter-Memorial at para. 379.

Swarthout's testimony. It follows that Claimant's failure to prove that Respondent's actions regarding Santa Ana impacted Corani persists, and thus, its Corani claim must fail. Moreover, Claimant's calculations of the purported damages to Corani are implausible and internally inconsistent. These issues are addressed in detail in Section C below and in Section III of Brattle's Second Report.

A. TRIBUNALS AWARD AMOUNTS INVESTED FOR NON-PRODUCING ASSETS

583. In its Counter-Memorial, Respondent explained that longstanding international law precedent makes clear that calculating damages using an income-based method—such as FTI's simple DCF approach—is simply too speculative, and therefore not appropriate, for an asset that is not a "going concern" or that lacks a history of profitability.[1109] Respondent cited 13 cases in which tribunals held that awarding lost profits for non-producing assets was not appropriate:

1. *Sola Tiles, Inc. v. Iran*, Iran-U.S. Claims Tribunal (Bockstiegel (P); Mostafavi; Holtzmann);[1110]

2. *Levitt v. Iran*, Iran-U.S. Claims Tribunal (Bockstiegel (P); Mostafavi; Holtzmann);[1111]

3. *Siag and Veccchi v. Egypt*, Award, ICSID Case No ARB/05/15 (D. Williams (P); Pryles; Orrego Vicuna);[1112]

[1109] Respondent's Counter-Memorial at paras. 321 *et seq*.

[1110] *Sola Tiles, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 298-317-1, April 22, 1987, 14 Iran-U.S. C.T.R. 224, at paras. 60-64 [Exhibit RLA-065] ("Sola also seeks compensation for . . . lost future profits. The Tribunal must therefore determine whether Simat qualifies as a 'going concern'. . . . Simat had the briefest past record of profitability, having shown a loss in 1976, its first year of trading, and a small profit the next year. Accordingly, the Tribunal assigns no value to future lost profits.").

[1111] *Levitt v. The Government of the Islamic Republic of Iran*, Award No. 297-209-1, April 22, 1987 14 Iran-U.S. C.T.R. 191, at paras. 56-58 [Exhibit RLA-059] (regarding a claim for a project that the tribunal found had "reached only a very early stage" the tribunal held "that the Claimant has not established with a sufficient degree of certainty that the project would have resulted in a profit. The claim in this respect is therefore dismissed.").

[1112] *Siag and Veccchi v. The Award Republic of Egypt*, ICSID Case No ARB/05/15, Award, June 1, 2009 ("*Siag*, Award"), at paras. 566-570 [Exhibit RLA-063] (referencing "the wisdom in the established reluctance of tribunals such as this one to utilise DCF analyses for 'young' businesses lacking a long track record of established trading. In all probability that reluctance ought to be even more pronounced in cases such as the present where the business is still in its relatively early development phase and has no trading history at all.").

4. *Gemphus SA v. Mexico*, Award, ICSID Case No ARB(AF)/04/3 (Veeder (P); Fortier; Magallón Gómez);[1113]

5. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (Lauterpacht (P); Civiletti; Siqueiros);[1114]

6. *Venezuela Holdings v. Venezuela*, ICSID Case No. ARB/07/27 (Guillaume (P); Kaufmann-Kohler, El-Kosheri);[1115]

7. *Southern Pacific Properties v. Egypt*, ICSID Case ARB/84/3 (Jimenez de Arechaga (P); El Mahdi; Pietrowski);[1116]

8. *Al-Bahloul v. Tajikistan*, SCC Case No. V064/2008 (Hertzfeld (P); Happ; Zykin);[1117]

9. *Wena Hotels Limited v. Egypt*, Award, ICSID case ARB/98/4 (Leigh (P); Fadlallah; Wallace);[1118]

10. *Phelps Dodge Corp. v. Iran*, Iran-U.S. Claims Tribunal (Briner (P); Aldrich; Bahrami-Ahmadl);[1119]

11. *Tza Yap Shum v. Republic of Perú*, ICSID Case No. ARB/07/6 (Kessler (P); Otero; Fernández-Armesto);[1120]

12. *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17 (Danelius (P); Brower; Stern);[1121] and

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[1113] *Gemplus SA and others v. The United Mexican States*, ICSID Case No ARB(AF)/04/3, Award, June 16, 2010 ("*Gemplus*, Award"), at paras. 13-70 to 13-72 [Exhibit RLA-064].

[1114] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000 ("*Metalclad*, Award"), at paras. 120-122 [Exhibit CL-0105].

[1115] *Venezuela Holdings, B.V. Mobil Cerro Negro Holding, Ltd. Mobil Venezolana de Petroleos Holdings, Inc. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, October 9, 2014 ("*Venezuela Holdings*, Award"), at paras. 382-385 [Exhibit RLA-062].

[1116] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case ARB/84/3, Award, May 20, 1992 ("*Southern Pacific,* Award"), at para. 188 [Exhibit RLA-060] ("In the Tribunal's view, the DCF method is not appropriate for determining the fair compensation in this case because the project was not in existence for a sufficient period of time to generate the data necessary for a meaningful DCF calculation").

[1117] *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V064/2008, Final Award, June 8, 2010 ("*Mohammad*, Award"), at para. 71 [Exhibit RLA-061] ("As a general rule assets need to qualify as a going concern and have a proven track record of profitability in order to be valued in accordance with the DCF-method.").

[1118] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case ARB/98/4, Award December 8, 2000 ("*Wena Hotels*, Award"), at paras. 123-125 [Exhibit CL-0147].

[1119] *Phelps Dodge Corp. v. Islamic Republic of Iran*, Award No. 217-99-2, March 19, 1986, 10 Iran-U.S. C.T.R., at para. 30 [Exhibit CL-0051].

[1120] *Tza Yap Shum v. The Republic of Perú*, ICSID Case No. ARB/07/6, Award, July 7, 2011 ("*Tza Yap Shum*, Award"), at paras. 262-263 [Exhibit RLA-041].

13. *PSEG Global, Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5 (Orrego Vicuña (P); Fortier; Kaufmann-Kohler).[1122]

584. Claimant dismisses this extensive jurisprudence—which includes decisions rendered in the world's leading arbitral fora by some of the most renowned international jurists—as a "small sample of investment treaty case law."[1123] This characterization is, of course, ludicrous. Claimant then goes a step further, accusing Respondent of obscuring doctrine by "conveniently fail[ing] to mention investment treaty cases where tribunals have endorsed DCF for early-stage projects."[1124] Claimant then cites just two cases—*Vivendi II v. Argentina* and *Gold Reserve v. Venezuela*—as examples.[1125] This effort is equally absurd: neither of the cases Respondent cites supports the proposition that a DCF analysis is the preferable method of valuing a pre-revenue project, and one of the cases says precisely the opposite.

585. First, Claimant looks to the *Vivendi II* award. Claimant's decision to cite *Vivendi II* is puzzling: the *Vivendi II* tribunal unambiguously rejected the use of the DCF method to value the early-stage asset at issue in that case.[1126] Instead, the *Vivendi II* tribunal awarded damages based on the claimants' amounts invested,[1127] noting that:

> a DCF analysis is not always appropriate and becomes less so as the assumptions and projections become increasingly speculative.

[1121] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, June 21, 2011 ("*Impregilo*, Award"), at paras. 380-381 [Exhibit RLA-066].

[1122] *PSEG Global, Inc. et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007 ("*PSEG*, Award") [Exhibit CL-0088].

[1123] Claimant's Reply at para. 418.

[1124] Claimant's Reply at para. 421.

[1125] Claimant's Reply at paras. 421-22. To avoid confusion, Respondent notes that Claimant mistakenly refers to the August 20, 2007 Award in the case of *Compañía de Aguas del Aconquija S.A. & Vivendi v. Argentine Republic* (ICSID Case No. ARB/97/3) as "*Vivendi I*". Within the international arbitration community, this decision is generally referred to as "*Vivendi II*" (with *Vivendi I* referring to the November 21, 2000 award of the original tribunal in the same case). We adopt this common nomenclature, and refer to this Award as *Vivendi II*.

[1126] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ("*Vivendi II*, Award"), at para. 8.3.11 [Exhibit CL-0038].

[1127] *Vivendi II*, Award at paras. 8.3.13 and 8.3.20 [Exhibit CL-0038].

> And, as Respondent points out, many international tribunals have stated that an award based on future profits is not appropriate unless the relevant enterprise is profitable and has operated for a sufficient period to establish its performance record.[1128]

586. Moreover, the asset in *Vivendi II* was far less speculative than Claimant's non-existent silver mines here: the *Vivendi II* claimants were operating an existing water services utility, had operated that utility for over two years at the time of the treaty breaches, and were doing so under a 30-year concession contract that specified many key elements for a DCF calculation[1129]—yet the tribunal still found the utility's future revenues too uncertain to rely on a DCF analysis. In short, Claimant's reliance on *Vivendi II*—one of only two cases it cites—is woefully misplaced. The *Vivendi II* tribunal explicitly rejected DCF analysis, opting instead to award amounts invested. This Tribunal should do the same.

587. Second, Claimant cites *Gold Reserve v. Venezuela*, a decision that is also unhelpful to Claimant. Unlike the case at hand, in *Gold Reserve*, the valuation experts for the claimant and for the respondent both "used the Discounted Cash Flow ('DCF') method as the primary method for assessing the quantum of damages"[1130] and "agreed on the DCF model used."[1131] Thus, the *Gold Reserve* tribunal was not asked to determine whether the DCF approach was any more or less appropriate than awarding amounts invested (or any other approach)—it simply applied the valuation method upon which both sides agreed. *Gold Reserve* is, therefore, entirely irrelevant to the question of whether a DCF analysis is preferable to awarding amounts invested for a non-producing asset like the hypothetical mines here.

[1128] *Vivendi II*, Award, at para. 8.3.3 [Exhibit CL-0038].

[1129] *Vivendi II*, Award at para. 4.5.5.

[1130] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014 ("*Gold Reserve*, Award"), at para. 690 [Exhibit CL-0063].

[1131] *Gold Reserve* Award at para. 830 [Exhibit CL-0063].

588. Claimant contends that, in *Gold Reserve*, "Venezuela accepted the reality that DCF is a perfectly appropriate and valid tool to measure the FMV of such a project."[1132] Claimant apparently hopes that the opinion of the Venezuelan Government will somehow sway this Tribunal's thinking. Of course it should not. In any event, a close reading of the *Gold Reserve* award reveals that Venezuela likely agreed to the DCF approach because the cash flow analysis that its expert put forward produced a *negative* valuation. Thus, Venezuela's support of DCF analysis was likely a strategic choice to reduce its liability, not a principled decision rooted in any belief that DCF valuation is "appropriate and valid" for assets with no history of profitable operation.

589. Without *Vivendi II* and *Gold Reserve*, Claimant is left to advocate for a DCF approach without a single case to support its position. But even if both *Vivendi II* and *Gold Reserve* offered full-throated support for Claimant's position (and we have shown that they do not), they would nonetheless represent a minority position, dwarfed by the long list of cases Respondent cited in its Counter-Memorial and referenced above.[1133] Claimant has not addressed, let alone convincingly distinguished, any of these cases in its written pleadings.

590. Unable to unearth any helpful precedent, Claimant turns to the text of the Treaty for support. The Treaty, however, is equally unavailing. Claimant asks the Tribunal to ignore jurisprudence, and focus instead on Article 812 of the FTA, which states that compensation for expropriation shall be based on the "fair market value" of the investment.[1134] Respondent does not dispute that fair market value is the appropriate standard in this case. The relevant question, however, is how reliably one can approximate fair market value for a project like Santa Ana,

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[1132] Claimant's Reply at para. 422.

[1133] Respondent's Counter-Memorial at para. 321.

[1134] Claimant's Reply at para. 420.

which never advanced beyond project planning, never received the requisite permits, never obtained a social license and community support, never proceeded to construction, and never operated profitably—all features that necessarily make any measure of value other than amounts invested highly speculative.

591. Numerous tribunals have determined that sunk costs are the best available proxy for the fair market value of a still-on-paper project like Santa Ana. For instance, the *Metalclad v. Mexico* tribunal held that "discounted cash flow analysis is inappropriate in the present case because the [investment] was never operative and any award based on future profits would be wholly speculative."[1135] It held instead that "*fair market value* is best arrived at in this case by reference to Metalclad's actual investment in the project."[1136]

592. The *Mobil v. Venezuela* tribunal took a similar approach to determining the fair market value of a petroleum project for which the claimant had secured certain regulatory approvals, but—like Claimant's projects here—was not yet under construction.[1137] The *Mobil* tribunal held that the project was "in a phase of development, which excludes the application of the DCF method in order to evaluate the market value of the Claimants' interests."[1138] Instead, the tribunal awarded Mobil its amounts invested, noting that: "the market value of the Claimants' interests in the [asset] must be established at the total of their investment in that Project."[1139]

593. These cases are sufficient to refute Claimant's "fair market value" argument, but the jurisprudence goes even further. Tribunals have even used amounts invested as a proxy for the

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[1135] *Metalclad*, Award at para. 121 [Exhibit CL-0105].

[1136] *Metalclad*, Award at paras. 120-122 (emphasis added) [Exhibit CL-0105].

[1137] *Venezuela Holdings,* Award at para. 85 [Exhibit RLA-062].

[1138] *Venezuela Holdings,* Award at para. 382 [Exhibit RLA-062].

[1139] *Venezuela Holdings,* Award at para. 385 [Exhibit RLA-062].

fair market value of an investment that *did* have a history of operations. For instance, the tribunal in *Wena v. Egypt* noted that the investment in that case—which included a hotel that had been in operation for a year-and-a-half—provided an "insufficiently solid base on which to found any profit … or for predicting growth or expansion of the investment made by Wena."[1140] The tribunal held that: "the proper calculation of the market value of the investment expropriated immediately before the expropriation is best arrived at, in this case, by reference to Wena's actual investments."[1141]

594. In sum, the reference to "fair market value" in the FTA, upon which Claimant rests much of its argument, should not impact the Tribunal's analysis. Most of the cases above described amounts invested as a measure of "market value," under treaty provisions analogous to the FTA's Article 812 here.[1142] Instead, the Tribunal should be guided by international law jurisprudence, which is clear that valuing a non-producing asset using amounts invested is preferred to speculating on future lost profits via a DCF model. Holding otherwise in this case would require the Tribunal to turn its back on the long list of arbitral awards that have followed that approach. Instead, the Tribunal should award (if anything) amounts invested. Based on

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[1140] *Wena Hotels*, Award at para. 124 (internal citations omitted) [Exhibit CL-0147].

[1141] *Wena Hotels*, Award at para. 125 (internal citations omitted) [Exhibit CL-0147]; *see also* *Vivendi II*, Award, at para. 8.3.3 [Exhibit CL-0038].

[1142] *See* Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, June 11, 1975, Art. 5 ("Such compensation shall amount to the market value of the investment . . . .") (at issue in *Wena Hotels v. Egypt* [Exhibit CL-0147]); Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, December 20, 1982, Art. VII ("Such compensation shall be based on the genuine value of the investment or returns expropriated . . . .") (at issue in *Gold Reserve, Inc. v. Bolivarian Republic of Venezuela* [Exhibit CL-0063]); North American Free Trade Agreement, Art. 1110.2 ("Compensation shall be equivalent to the fair market value of the expropriated investment . . . .") (at issue in *Metalclad v. United Mexican States* [Exhibit CL-0105]); Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, Art. 6 ("Such compensation shall represent the market value of the investments affected . . . ") (at issue in *Mobil Corp. v. Bolivarian Republic of Venezuela* [Exhibit RLA-062]).

Claimant's own financial statements, Brattle calculated that figure at $21,827,687 for Santa Ana.[1143] Claimant's expert offers no alternative calculation.[1144]

B. THE TRIBUNAL MUST REJECT CLAIMANT'S DCF ANALYSIS FOR SANTA ANA BECAUSE IT IS INACCURATE, INFLATED, AND UNRELIABLE

595. As demonstrated above, investor-state jurisprudence weighs against valuing Santa Ana—a non-producing asset with no history of profitability—using a DCF model. These precedents all comport with common sense: an approach grounded in discounting future cash flows is ill suited for an asset with no history of any cash flows based on actual operations. Nonetheless, in the first of many attempts to inflate its damages, Claimant asks this Tribunal to accept a flawed cash flow-based analysis. As we explain below, the inaccuracy and unreliability of Claimant's DCF model underscores the fact that the DCF approach is unfit for a non-producing asset like Santa Ana.

596. Below, we explain that: (i) FTI's simple DCF methodology is imprecise and unreliable; (ii) Brattle's modern DCF analysis, properly calibrated with Bear Creek's value established in the stock market, demonstrates that FTI has drastically overvalued Santa Ana; and (iii) that assessment is confirmed by Brattle's further analysis of Bear Creek's stock market valuation. For these reasons, the Tribunal must reject FTI's misguided DCF approach.

1. FTI's Simple DCF Analysis Is Imprecise, Unreliable, and Based on Flawed Technical Inputs

597. In its Counter-Memorial, Respondent explained that FTI's methodology for its DCF analysis is flawed and imprecise because it does not capture differences in the risk of separate cash flows—including pivotal inputs like metal prices and mining costs—and assumes instead

[1143] Brattle First Report at para. 39 [Exhibit REX-004]; Brattle Second Report at para. 248 [Exhibit REX-010].

[1144] Reply Report of FTI Consulting, January 8, 2016 ("FTI Reply Report"), at para. 4.3(vii).

that all cash flows "become exponentially riskier over time."[1145] Brattle called this approach "simple" and "simplistic," noting that "it is unlikely that any project's cash flows will have exponentially increasing uncertainty."[1146] In a simple DCF model like FTI's, *all* risks borne by the project are subsumed in a single, blunt "risk premium" component of the discount rate, regardless of their impact or probabilities. Brattle also explained that FTI's approach to DCF analysis was vulnerable to large swings in valuation from minor tweaks to the applied discount rate.[1147]

598. FTI offered no specific responses to Brattle's criticisms of its core methodology. Instead, FTI devoted considerable effort to attacking the preferred "modern DCF" approach (also called a "real options DCF"), which, Brattle explained, would eliminate some—but not all—of the imprecision and volatility in FTI's simplistic model.[1148] Brattle has rebutted those criticisms in its Reply Report, as will be discussed in Section V(B)(2) below.[1149]

599. Beyond the core methodological weakness of FTI's approach, its simple DCF model also suffers from a reliance on estimated technical inputs—operating costs, metal recovery rates, etc.—as opposed to actual technical inputs, many of which would have been available if Santa Ana had reached production. This is another critical source of uncertainty when applying a DCF analysis to a non-producing asset.

600. Claimant is left to rely entirely on estimates for its key technical inputs, most of which it adopts from Roscoe Postle Associates ("RPA"). In addition to not reflecting any actual

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[1145] Respondent's Counter-Memorial, para. 333.

[1146] Brattle First Report at paras. 88-89 [Exhibit REX-004].

[1147] Brattle First Report at para. 91 [Exhibit REX-004].

[1148] Brattle First Report at paras. 92 *et seq.* [Exhibit REX-004].

[1149] Brattle Second Report at Section II.B [Exhibit REX-010]. Brattle performed a DCF analysis using the modern approach for Santa Ana, the results of which are also discussed in Section V(B)(2) below.

operational data, several key technical inputs are also inaccurate—not surprisingly, in directions that inflate Claimant's claims. Among the most salient of these erroneous inputs are: (i) overstated mineral reserves and resources; (ii) understated mining costs; and (iii) overly ambitious production timelines. FTI's use of these faulty inputs renders its simple DCF analysis even more inaccurate and unreliable.[1150] We address each of these technical inputs in further detail below.

601. Without endorsing FTI's flawed simple DCF approach, Brattle re-ran FTI's damages model with the proper, corrected values for each of these inputs for two scenarios: (i) a "Base Case", which considers only mineral reserves (*i.e.*, the economically mineable portion of the ore body); and (ii) an "Extended Life Case", which considers mineral reserves as well as some of the mineral resources (*i.e.*, the portion of the ore body that is not currently economically mineable, but may become economical in the future). By correcting just the flawed technical parameters set out above, FTI's Santa Ana damages estimate drops from $191 million to $54 million in the Base Case, and from $224 million to $70 million in the more speculative Extended Life Case.[1151]

a. <u>Claimant's adoption of inappropriate cut-off grades leads it to improperly inflate reserve and resource estimates</u>

602. To accompany its Counter-Memorial, Respondent submitted an expert mining report from SRK Consulting ("SRK"), which critiqued a number of RPA's recommended inputs

[1150] Brattle First Report at Section II(D)(2) [Exhibit REX-004]; Brattle Second Report at Section II.E [Exhibit REX-010].

[1151] Brattle First Report at Tables 1 and 6 [Exhibit REX-004].

into FTI's DCF model.[1152] In its second report, SRK maintains its position that RPA's inputs contain critical errors that serve to significantly inflate FTI's Santa Ana damages estimate.[1153]

603. For example, SRK determined that RPA applied a "cutoff grade" that was inappropriately low. The cutoff grade is the level of a mineral (in this case, silver) in an ore body below which it is not economically viable to mine and process the ore. At a lower cutoff grade, more of a site's ore deposits will appear to be economic to mine, and the mine will be reported as having larger-than-appropriate reserves. As SRK explained in its first report:

> the determination of an economic cutoff grade … is essential to determining whether to proceed to the construction phase. The cutoff grade itself is a function of the operating costs and revenue associated with mining, processing and product sale. In order to build a mine, the mineral deposit must be valuable enough to pay for the costs of design and construction (i.e., capital costs), the costs of mine operation (i.e., operating costs), and for mine closure and reclamation costs while generating an acceptable return on the capital invested, by way of a profit stream.[1154]

604. SRK maintains its position that the single cutoff grade RPA applied (17.5 grams of silver per metric ton for reserves and 14 grams for resources) is far too low and therefore generated inappropriately high estimates of the Project's economically mineable reserves and resources.[1155] More appropriate would have been a breakeven cutoff grade of 30 grams per metric ton and an internal/milling cutoff grade of 27 grams per metric ton, as was applied in

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[1152] Expert Report of SRK Consulting, October 6, 2015 ("SRK First Report"), at Section 6 [Exhibit REX-005].

[1153] Expert Report of SRK Consulting, April 13, 2016 ("SRK Second Report"), at Section 2.1 [Exhibit REX-011]; *see also* SRK First Report at Section 4 [Exhibit REX-005].

[1154] SRK First Report at para. 33 [Exhibit REX-005]; *see also* SRK Second Report at paras. 10-14 [Exhibit REX-011].

[1155] SRK Second Report at paras. 18, 20-21 [Exhibit REX-011]; *see also* SRK First Report at para. 67 [Exhibit REX-005].

Claimant's own 2011 Feasibility Study for Santa Ana.[1156] The impact of RPA's too-low cutoff grade was to inflate the estimated Base Case reserves by a full 24%, from the 37 million metric tons stated in Bear Creek's own 2011 Feasibility Study to 46 million metric tons claimed in RPA's Reports,[1157] and from that inflated base RPA generated an even more speculative Extended Life Case with mineral potential of 81 million metric tons.[1158] In sum, SRK confirms that:

> RPA made fundamental errors in both the nature of the cut-off grade applied (breakeven versus milling/internal) and quantum of the cut-off grade as a result of using inflated silver prices and unrealistic silver metallurgical recoveries. This resulted in a gross overstatement of both resources and "reserves" in both the [Base] Case and the [] Extended [Life] Case[].[1159]

605. FTI's incorporation of RPA's grossly overstated reserve and resource figures into its DCF valuation inflated FTI's estimate, resulting in an inaccurate and improper valuation of Santa Ana. Brattle re-ran FTI's DCF model using SRK's revised reserve estimates, which standing alone resulted in a $25 million reduction in the result FTI's DCF for the Base Case from $191 million to $166 million.[1160]

606. Because RPA's Extended Life Case did not reflect a realistic mining plan and was not appropriate for valuation, Brattle instead asked SRK to prepare a mine plan that was consistent with RPA's intent to support an "extended case" (*i.e.* one that values some of the less certain mineral resources in addition the more certain mineral reserves), with SRK's

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[1156] SRK Second Report at para. 18, 31 [Exhibit REX-011]; *see also* SRK First Report at para. 70 [Exhibit REX-005]; *see also* Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, April 1, 2011, at Table-17.5 and pp. 61-62, 87 [Exhibit C-0061].

[1157] SRK Second Report at para. 21 [Exhibit REX-011].

[1158] SRK Second Report at para. 40 [Exhibit REX-011].

[1159] SRK Second Report at para. 27 [Exhibit REX-011].

[1160] Brattle First Report at paras. 100, 128 [Exhibit REX-004].

recommended technical parameters for mine planning and Brattle's silver price projections. Using that adjusted "extended case" in FTI's simple DCF model reduced FTI's Extended Life Case result from $224 million to $178 million.[1161]

b. Claimant's cost projections are too low

607. SRK also stands by its position that the mining costs projections that RPA recommended, and that Claimant adopted, are unrealistically low.[1162] In its first report, SRK noted that RPA's analysis of mining costs overlooked the fact that Claimant planned to use a contract miner at Santa Ana. SRK observed that:

> The contract miner will provide its own mining equipment with no capital cost to the project. . . .Consequently the contract mining price charged by the mining contractor will have to cover the actual costs incurred, generate a return on the capital employed to purchase the equipment plus a fee or contractor profit. The figure of US$1.68 per tonne of material moved used in the Feasibility Study is therefore pitifully too low.[1163]

608. SRK also noted that the Santa Ana project will face special challenges, and likely increased operating costs, due to its high altitude.[1164] The Santa Ana deposit lies more than 4,000 meters above sea level in the remote, high Andes. This extreme environment can lead to health problems for workers as well as mechanical equipment failure. SRK concluded that: "these challenges will likely result in lower labor and equipment productivity which also supports the adoption of a higher operating cost."[1165]

[1161] Brattle First Report at Table 1 [Exhibit REX-004].

[1162] SRK Second Report at paras. 28 *et seq.* [Exhibit REX-011]; *see also* SRK First Report at paras. 79-80 [Exhibit REX-005].

[1163] SRK First Report at paras. 79-80 [Exhibit REX-005].

[1164] SRK First Report at para. 80 [Exhibit REX-005]; SRK Second Report at para. 28 [Exhibit REX-011].

[1165] SRK First Report at para. 80 [Exhibit REX-005].

609. In its Second Report, SRK rejected RPA's criticisms of its recommended increase in operating costs, noting that its proposed cost estimate ($2.50 per tonne of material moved) falls below an estimate prepared by Infomine, an independent organization that provides data on the mining industry.[1166] For these reasons, SRK maintains its recommended increase in projected mining costs from $2.10 per tonne of material to $2.50 per tonne of material.[1167]

610. Brattle also includes a 14% increase in capital costs, which as Brattle explains, corrects (using empirical studies of mining cost overruns) for the tendency within the industry to significantly understate project costs in mining feasibility studies.[1168] Brattle rejects FTI's objection to this adjustment, noting, *inter alia*, that the Chairman of Claimant's expert RPA, Mr. Graham Clow, shares Brattle's view that feasibility studies typically underestimate capital costs (in his estimate, by 20-25%).[1169]

c. <u>Claimant applies an overly ambitious production timeline</u>

611. FTI's DCF analysis also adopts an overly aggressive production timeline that Brattle, SRK, and Respondent's Peruvian mining law expert all maintain is unrealistic.[1170] Specifically, Respondent's experts have explained that the production schedule FTI used failed to account for delays due to: (i) permitting; (ii) social unrest and protests; and (iii) operational issues (*i.e.*, recruitment and staffing difficulties) and construction problems.[1171] We discuss these sources of delay further below.

[1166] SRK Second Report at para. 28 [Exhibit REX-011]. Moreover, the Infomine cost does not even include all the capital recovery costs that a contract miner would include in its cost charged to Bear Creek.

[1167] SRK First Report at para. 80 [Exhibit REX-005].

[1168] Brattle First Report at para. 101 [Exhibit REX-004]; Brattle Second Report at para. 219 [Exhibit REX-010].

[1169] Brattle Second Report at paras. 220-223 [Exhibit REX-010].

[1170] SRK First Report at Section 6.10 [Exhibit REX-005]; Brattle First Report at Section II(D)(2)(b) [Exhibit REX-004]; Expert Report of Luis Rodríguez-Mariátegui Canny, October 6, 2015 ("Rodríguez-Mariátegui Report"), at paras. 107-108 [Exhibit REX-003].

[1171] Respondent's Counter-Memorial at para. 346.

612. *First*, as Respondent explained in its Counter-Memorial,[1172] the production schedule FTI adopted does not include *any* allowance for delays in obtaining the many and complex permits that are required to move a mining project toward operation. In its second report, SRK reaffirms its conclusion that permitting delays should have been expected, based on an array of similar projects that it analyzed.[1173] Respondent's mining law expert Dr. Rodríguez-Mariátegui echoes SRK's opinion, noting that as of June 2011, Bear Creek had obtained *none* of the necessary land use agreements with communities or land holders,[1174] and still needed to receive approximately 40 permits and approvals before proceeding to production, approval of which (including in particular the all-important EIA) were in no way automatic or assured, and many of which had substantial potential to significantly delay the project even if they could eventually be obtained.[1175] As such, he concluded that:

> it would have been very difficult—if not impossible— for Bear Creek to have been able to begin construction of the Santa Ana Project facilities during the second semester of 2011, as stated in its Memorial, or to have been able to begin production in the fourth quarter of 2012, as is also mentioned in its Memorial.[1176]

613. *Second*, FTI and RPA ignore entirely the prospect of project delays or suspensions due to social unrest and protests in the region. Indeed, FTI admits that it assumed this factor away apparently under a legal instruction that, in effect, all delays or suspensions due to social

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[1172] Respondent's Counter-Memorial at para. 347.

[1173] SRK Second Report at Section 2.7 [Exhibit REX-011]; *see also* SRK First Report at para. 90 [Exhibit REX-005].

[1174] Rodríguez-Mariátegui Report at paras. 40,67 [Exhibit REX-003]. Claimant contends that it had come to terms with one of four affected communities. Respondent has explained that even that one 'deal' was not yet a binding agreement and was likely defective, the other three communities were unlikely to agree soon (if ever, given the intense community opposition to the Project), and then there were some 94 further agreements that would need to be reached with individual occupants of the affected properties. *See* Section II(C)(2) above; Rodríguez-Mariátegui Report at para. 67 [Exhibit REX-003].

[1175] Rodríguez-Mariátegui Report at para. 107-108 [Exhibit REX-003].

[1176] Rodríguez-Mariátegui Report at para. 108 [Exhibit REX-003]; *see also* Second Rodríguez-Mariátegui Report at para. 133 [Exhibit REX-009].

opposition should be treated as attributable to Treaty-breaching conduct by the Government.[1177] This, of course, is an unsupportable premise—community opposition arises independently of the Government, and, as other stalled projects in Perú have shown, community opposition can thwart a mining project even when it has received government permits.[1178]

614. Assuming away social opposition is especially implausible given the long history of popular uprisings against the mining industry in Perú (which SRK and Brattle described in their initial reports[1179]) and the fact that Santa Ana was already the target of wide-spread, severe protests.[1180] Brattle reviewed recent mining projects in Perú, and determined that other Peruvian mining projects that faced social unrest experienced average delays of four years.[1181] FTI criticized Brattle for not "address[ing] any specific characteristics at Santa Ana that would give rise to such a long [protest-related] delay."[1182] As Brattle notes, however, this is a red herring:

> of course community opposition at each mine has unique aspects. Our point is that community opposition in general causes substantial delays, and FTI cannot avoid this reality by suggesting that our comparison data may not exactly match the type of community opposition at Santa Ana.[1183]

615. *Third*, RPA has failed to refute SRK's position that operational difficulties, such as staff recruitment for a project in a remote region, and construction problems occasioned by Santa

[1177] Reply Report of FTI Consulting, January 8, 2016 ("FTI Reply Report"), at para. 6.51.

[1178] *See* Section II(H)(2) above.

[1179] SRK First Report at para. 90 [Exhibit REX-005]; Brattle First Report at para. 105 [Exhibit REX-004].

[1180] Peña Second Report at paras. 96 *et seq.* [Exhibit REX-002].

[1181] Brattle First Report at para. 105 [Exhibit REX-004].

[1182] FTI Reply Report at para. 7.42.

[1183] Brattle Second Report at para. 226 [Exhibit REX-010]

Ana's high altitude, would have led to still further delays.[1184] As such, this too should have been reflected in FTI's production timeline.

616. Based on all of the issues discussed above, Brattle extended FTI's pre-production timeline by four years. This further significantly lowers the value of Santa Ana under FTI's model in both the Base Case and the Extended Life Case.[1185]

617. In total, by adjusting the DCF parameters as set out above, FTI's Santa Ana valuation plummets from $191 million to $54 million in the Base Case, and from $224 million to $70 million in the more speculative Extended Life Case, even as it *still* fails to account for any risk that the Santa Ana Project could fail due to community opposition.[1186] These marked drops highlight two key facts: (i) Claimant's damages estimate is wildly inflated; and (ii) Claimant's DCF analysis is vulnerable to large valuation swings based on a handful of adjustments to technical inputs. As explained below, Brattle's modern DCF mitigates, but does not eliminate, this volatility.

2. Brattle's Modern DCF Analysis Confirms that FTI's Simple DCF Model Provides an Inflated Damages Figure, and Signals that DCF Analysis Is Unsuited for this Non-Producing Asset

618. Brattle's modern DCF (or "real options DCF") approach has two critical advantages over FTI's simple DCF analysis. First, the modern approach takes full advantage of market inputs to forecast cash flows and to transparently quantify risks that might impact those cash flows. Second, and critically, unlike FTI, Brattle's approach is calibrated to consider the fair market value of the asset as measured by reference to Bear Creek's enterprise value (using its

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[1184] SRK First Report at para. 92 [Exhibit REX-005].

[1185] Brattle First Report at para. 105 and Table 6 [Exhibit REX-004].

[1186] Brattle First Report at Tables 1 & 6 [Exhibit REX-010]. Brattle found no basis in FTI's Second Report to revise those calculations in its own Second Report.

share price). In this way, Brattle's analysis includes a built-in "reality check" meant to identify, and correct for, risks to cash flows that FTI's method cannot detect.

619. As Brattle explains, calibration to share price is particularly crucial for Santa Ana, because:

> Santa Ana was subject to rising community opposition that created the possibility that the Project could not be developed. Since any income approach is forward looking, the probability that the Project's cash flows may not be realized must be taken into account. Community opposition introduces such a risk and its varying impact on value over time is taken into account in Bear Creek's share price.[1187]

620. According to Brattle, it is impossible to ascertain this "social license" risk without considering Bear Creek's stock price.[1188] Brattle's analysis indicates that the impact of such enduring social license risk on Santa Ana's value was substantial.[1189] FTI's uncalibrated DCF model ignores this risk altogether, which leads FTI to dramatically overvalue Santa Ana.

621. Using its enhanced approach to DCF analysis, Brattle calculated Santa Ana's value as of June 23, 2011 (on the assumption that the Tribunal finds that the EIA suspension did not breach the FTA, but Supreme Decree No. 032 did so), and on May 27, 2011 (in case the Tribunal finds that both the EIA suspension and the Decree breached the FTA). For June 23, 2011, Brattle estimated that Santa Ana's value fell within the range of $32 million to $119 million.[1190] For May 27, 2011, Brattle estimated that Santa Ana's value fell within the range of $40 million to $113 million.[1191]

[1187] Brattle Second Report at para. 113 [Exhibit REX-010].

[1188] Brattle Second Report at paras. 71, 115 [Exhibit REX-010].

[1189] Brattle Second Report at paras. 119-121, Table 2 [Exhibit REX-010].

[1190] Brattle Second Report at para. 121, Table 2 [Exhibit REX-010].

[1191] Brattle Second Report at para. 123, Table 3 [Exhibit REX-010].

622. Although it produces a broad range of values, Brattle's calibrated, modern DCF analysis yields estimates for Santa Ana that, when combined with the value of Corani, are consistent with Bear Creek's share price. In other words, unlike FTI's estimate, Brattle's valuation reflects reality.

623. Including share price calibration in its Santa Ana DCF analysis required Brattle to value Corani as well, because Bear Creek's share price includes the value of both projects (which were effectively the company's only assets).[1192] With respect to Corani, SRK and Brattle uncovered a critical technical risk related to metallurgy that has the potential to render the entire Corani project infeasible, or at a minimum reduce its value in the market. This issue is discussed further in paragraphs 655 to 656 below.

624. As noted earlier, FTI's Reply critiqued the modern DCF approach recommended by Professor Davis and Brattle. Specifically, FTI argued that modern DCF analysis: (i) is inconsistent with accepted mining valuation standards;[1193] (ii) has not gained wide acceptance among mine valuation professionals;[1194] and (iii) is more vulnerable to subjective inputs than FTI's approach to DCF.[1195]

625. Brattle refutes each of these arguments.[1196] First, Brattle explains that CIMVal[1197]—the preeminent professional organization in the field of mineral valuation—recognizes the modern DCF approach as a primary valuation method.[1198] As such, since FTI

[1192] Brattle Second Report at para. 116 [Exhibit REX-010].

[1193] FTI Reply Report at para. 7.11.

[1194] FTI Reply Report at paras. 7.12-7.14.

[1195] FTI Reply Report at para. 7.16.

[1196] Brattle Second Report at Section II.B [Exhibit REX-010].

[1197] CIMVal is shorthand for the Canadian Institute of Mining, Metallurgy and Petroleum on Valuation of Mineral Properties.

[1198] Brattle Second Report at para. 85 [Exhibit REX-010].

claims to conduct its valuation in line with the CIMVal standards and Guidelines, Brattle notes that:

> FTI's suggestion that the modern DCF approach can be ignored … because FTI 'must adhere to professional practice standards and international valuation standards which indicate the DCF is the preferred valuation methodology' is thus nonsensical.[1199]

626. Regarding the acceptance and usage of modern DCF methodology, Brattle explains that its modern analysis is "a mainstream approach to valuation in both academic circles and in valuations by large mining companies and royalty companies."[1200] Brattle noted that there exist hundreds of academic articles on the modern DCF approach, as well as discussions of modern DCF in basic finance textbooks. In Brattle's words, "[t]he literature on [modern DCF] is extensive, and we see no point in burdening the tribunal with hundreds of additional citations that should have been familiar to any valuation expert."[1201]

627. Finally, Brattle demonstrates that FTI's criticism of the so-called "subjectivity" of the modern DCF approach is invalid, explaining that:

> the real options approach requires fewer assumptions [than FTI's model in this case], as it replaces FTI's assumptions about metal prices and the project discount rate with market-based forecasts of metal prices that already embed market-based risk discount factors.[1202]

628. Brattle also explains that certain of FTI's criticisms of the imprecision in modern DCF models apply to *all* income-based approaches, including FTI's own simple DCF model.[1203] As such, although Brattle convincingly addresses each of FTI's criticisms, it acknowledges that

[1199] Brattle Second Report at para. 88 [Exhibit REX-010].

[1200] Brattle Second Report at para. 91 [Exhibit REX-010].

[1201] Brattle Second Report at para. 95 [Exhibit REX-010].

[1202] Brattle Second Report at para. 104 [Exhibit REX-010].

[1203] Brattle Second Report at para. 104 [Exhibit REX-010].

imprecision exists in *any* cash flow-based valuation. These imprecisions only intensify when valuing an asset—like Santa Ana—with no history of operational cash flows, significant but unquantified social license risk, and where comparing the asset to Bear Creek's share price is made difficult by the fact that the share price also includes the value of Corani.

629. In the end, Brattle's modern DCF analysis confirms that FTI's simple DCF valuation drastically overstates Santa Ana's value. While it is an improvement on FTI's simple DCF, the modern DCF analysis also signals clearly (by virtue of the uncertainties it cannot avoid and the broad ranges of its results given the peculiarities of valuing Santa Ana) that DCF methods—including both the simple and modern approaches—are not ideal tools for this Tribunal to value Santa Ana, which has no history of profitable operation and is subject to serious uncertainties, including difficult-to quantify social license risk. For this reason, investment treaty tribunals routinely reject the use of DCF valuation for non-producing assets, as discussed in Section A above.

3. Share Price Analysis of Santa Ana Confirms that FTI's Simple DCF Calculation Is Inflated and Unreliable

630. In its first report, Brattle presented a market-based benchmark valuation of Santa Ana based on Bear Creek's share price to test the plausibility of FTI's DCF calculations. The stock market benchmarking confirmed what is by now quite clear: FTI's DCF yields inflated, unreliable estimates of Santa Ana's value. Brattle's market-based benchmarking approach involved two basic steps:[1204]

- **Step One**: Determine Bear Creek's enterprise value (*i.e.*, the value of the company, whose only assets were Santa Ana and Corani) immediately before the alleged Treaty breach. Brattle calculated enterprise value by multiplying Bear Creek's stock price by the total number of outstanding shares on the day in question.

[1204] Counter-Memorial at paras. 357 *et seq*.

- **Step Two**: Multiply this enterprise value by the percentage of Bear Creek's total value attributable to Santa Ana alone, as estimated by several market analysts using their own simple DCF tools. This produces an indicative but imprecise market benchmark of Santa Ana immediately before the alleged Treaty breach.

631. The strength of Brattle's market-based benchmark method is its grounding in Bear Creek's share price—a concrete, precise, real-world measure of value. Brattle explained that: "Bear Creek is publicly traded on the TSX Venture Exchange (TSXV) in Canada. Its share price on the Valuation Date therefore provides a direct measure of the combined FMV of all the company's assets, including Santa Ana."[1205] The only uncertainty is the apportionment of this value between Bear Creek's two assets.

632. Brattle applied its straightforward market-based calculations to produce the valuations for Santa Ana on two dates: (i) June 23, 2011, which would apply if the Tribunal were to determine that Supreme Decree No. 032 breached the FTA, but that the suspension of the processing of the EIA did not;[1206] and (ii) May 27, 2011, which would apply if the Tribunal were to determine that both Supreme Decree No. 032 and the EIA suspension breached the Treaty.[1207] Using the average of the analyst allocations, the Santa Ana portion of Bear Creek's total value corresponded to $89.1 million on June 23, 2011 and to $104.3 million on May 27, 2011.[1208] The table below compares these figures to the FTI's simple DCF valuation and to Brattle's modern DCF results from its reply report:

[1205] Brattle First Report at para. 51 [Exhibit REX-004].

[1206] Brattle First Report at Table 4 [Exhibit REX-004].

[1207] Brattle First Report at Table 3 [Exhibit REX-004].

[1208] Brattle First Report at Tables 3 and 4 [Exhibit REX-004]

Analysis	May 27, 2011 Valuation Date	June 23, 2011 Valuation Date
Stock Market Analysis – Benchmark Valuations	avg. $104.3 million	avg. $89.1 million
Modern DCF	$40 - $113 million	$32 - $119 million
Simple DCF	n/a	$224.2 million[1209]

633. This simple chart illustrates two critical points: (i) FTI's simple DCF valuation is drastically inflated, and at odds with benchmark values determined from Bear Creek's share price; and (ii) Brattle's modern DCF valuation produces estimates and ranges that are in line with the stock market valuation, although it generates estimates with wide ranges.

634. FTI tries to explain away the more than $130 million disconnect between its $224.2 million valuation and the average $89.1 million benchmark established by Bear Creek's own stock price by invoking the concept of "acquisition premium."[1210] Specifically, FTI argues that the market-based analysis fails to account for, and allocate to Santa Ana's value, a "premium" that a hypothetical buyer of 100% of Bear Creek's shares would pay over and above Bear Creek's share price.[1211] FTI's argument is meritless.

635. First, Brattle explains that when acquisitions do occur at a premium, it reflects perceived synergies created through the sale.[1212] But such synergies do not materialize in every acquisition. Furthermore, Brattle notes that:

[1209] Report of FTI Consulting, May 29, 2015 ("First FTI Report"), at para. 10.1.

[1210] FTI Reply Report at para. 4.3(i).

[1211] FTI Reply Report at para. 4.3(i).

[1212] Brattle Second Report at para. 49 [Exhibit REX-010].

> [T]o the extent that the possibility of a synergistic acquisition exists and is relevant to estimating Bear Creek's FMV, it is already reflected in Bear Creek's share price. A buyer of the shares would stand to benefit from any subsequent acquisition at a premium. He would therefore be willing to pay up to the expected value of that premium.[1213]

636. Professor Damodaran—an international valuation expert upon whom FTI itself[1214] has relied—takes the same position that a company's stock price already reflects an acquisition (or "control") premium, and thus, no artificial adjustment is necessary.

637. Second, the application of acquisition premiums to any valuation based on share prices is controversial among valuation professionals, and in any case it should be done after considering the specific circumstances of the valuation target.[1215] FTI has not done so—to the contrary, it attempted to justify its inflated valuation by resorting to a flawed measure, the average acquisition premium in other mining transactions.

638. In sum, Brattle has addressed FTI's criticisms regarding acquisition premiums and there is no basis to believe that such a premium can explain the fact that FTI would assign a value to Santa Ana that is about 250%, or more than $130 million higher than the global market thought that it was worth. As such, Brattle's stock market benchmarking analysis stands as a useful "reality check" for the valuations the Parties' experts have presented. Brattle's modern DCF produces a narrower range of values also grounded in Bear Creek's share price. FTI's simple DCF does not: it produces a valuation that is *much more than double* Brattle's stock price-based estimate, includes a range of values that do not even reflect the full imprecision of

[1213] Brattle Second Report at para. 55 [Exhibit REX-010].

[1214] First FTI Report at Appendix 4.

[1215] Brattle Second Report at paras. 49, 58 [Exhibit REX-010].

their results (as shown by Brattle), and is not reconciled with any market indicator of value. This alone is sufficient reason to jettison FTI's DCF analysis.

C. CONCLUSION REGARDING CLAIMANT'S SANTA ANA DAMAGES CLAIM

639. The Tribunal has been presented with three options for valuing Santa Ana:

640. *First*, the Tribunal may consider—but quickly should reject—FTI's simple DCF analysis. Respondent's pleadings and Brattle's analysis have exposed FTI's method as unreliable, methodologically weak, and based on false assumptions. The Tribunal should dismiss it without delay.

641. *Second*, the Tribunal may consider Brattle's modern DCF analysis. Although calibrated with Bear Creek's share price and far more reliable and transparent than FTI's effort, even the modern DCF approach cannot escape the imprecision inherent in using a cash-flow based method to value an asset with no history of operational cash flows, and with serious but difficult-to-quantify social license risks. For these reasons, the Tribunal should turn instead to the third option, amounts invested, in any event.

642. *Third*, the Tribunal should consider, and settle upon, the amounts invested approach. An award of the amounts Bear Creek invested as of the date of breach rests on a concrete, observable benchmark, rather than assumption, estimation and speculation. What is more, as Professor Pryles noted in his 2007 article, awarding such amounts invested (sometimes referred to as "sunk costs"):

> from an economics perspective, should produce a similar result to compensation calculated on this basis of future profits, unless the claimant argues that the project would have experienced exceptionally high or low profitability. And, if a claimant does claim it would have received unusually high profitability, its

> unproven track record gives incentive to avoid profits as the measure for assessing compensation.[1216]

643. Assuming *arguendo* that it finds any basis for liability at all, the Tribunal should adopt this insight—and that of the numerous arbitral tribunals that have rejected DCF analysis for non-producing assets—and award Claimant, at most, its amounts invested at Santa Ana.

D. CLAIMANT'S DAMAGES CLAIM FOR CORANI LACKS MERIT AND MUST BE REJECTED

644. While Claimant's claim for Santa Ana is inflated, its claim for Corani borders on the absurd. In its Counter-Memorial, Respondent demonstrated that Claimant's Corani claim must fail because Claimant cannot prove the fundamental elements of its claim: (1) that it suffered enduring harm to its Corani investment; and (2) that a sufficiently direct and proximate link exists between the measures Respondent took vis-à-vis Santa Ana and the alleged Corani damages.[1217]

645. Respondent also criticized Claimant's exclusive reliance on the witness testimony of Mr. Swarthout (rather than offering more broad-based and convincing evidence),[1218] and pointed to Claimant's scant treatment of Corani (just two paragraphs in its facts section[1219] and three paragraphs in its damages section[1220]) as evidence that Claimant knew the claim was weak.

646. Claimant has done nothing to rebut these arguments. In its Reply, Claimant dedicates *zero* paragraphs of its facts section to Corani, and—once again—rests its entire case

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[1216] Michael Pryles, "*Lost Profit and Capital Investment*," 1 WORLD ARBITRATION AND MEDIATION REVIEW, No. 1, 2007, at 9-10 (internal citation omitted) *available at* http://www.arbitration-icca.org/media/0/12223892171920/damages_in_the_international_arbitration_paper.pdf (last visited September 21, 2015) [Exhibit RLA-067].

[1217] Respondent's Counter-Memorial at paras. 367 *et seq.*

[1218] Respondent's Counter-Memorial at para. 379.

[1219] Claimant's Memorial at paras. 55-56.

[1220] Claimant's Memorial at paras. 242-244.

for the very existence of any Corani damages resulting from Supreme Decree No. 032 on Mr. Swarthout's self-serving witness testimony. Claimant's failure to provide additional evidence to prove its case indicates that either: (i) Claimant did not take the time to search for more evidence, because it recognized that its Corani claim was a lost cause; or (ii) Claimant did try to locate helpful evidence, but none existed. Either way, the Corani claim rests on an insufficient factual foundation, and the Tribunal should not hesitate to reject it in full.

647. In the sections that follow, Respondent explains that: (i) Claimant's Corani claim fails because Claimant has not proven that Respondent's actions regarding Santa Ana caused *any* lasting damage to Corani's market value; (ii) Claimant's Corani claim also fails because Claimant has not proven that the actions regarding Santa Ana were the direct and proximate cause of its alleged Corani damages; and (iii) Claimant's quantum analysis of Corani damages is inflated and internally inconsistent.

1. Claimant's Claim for Corani Damages Fails Because It Has Not Proven that Respondent's Actions Regarding Santa Ana Caused Lasting Damage to Corani's Market Value

648. As the *Rompetrol v. Romania* tribunal recently observed, the function of a damages award is to:

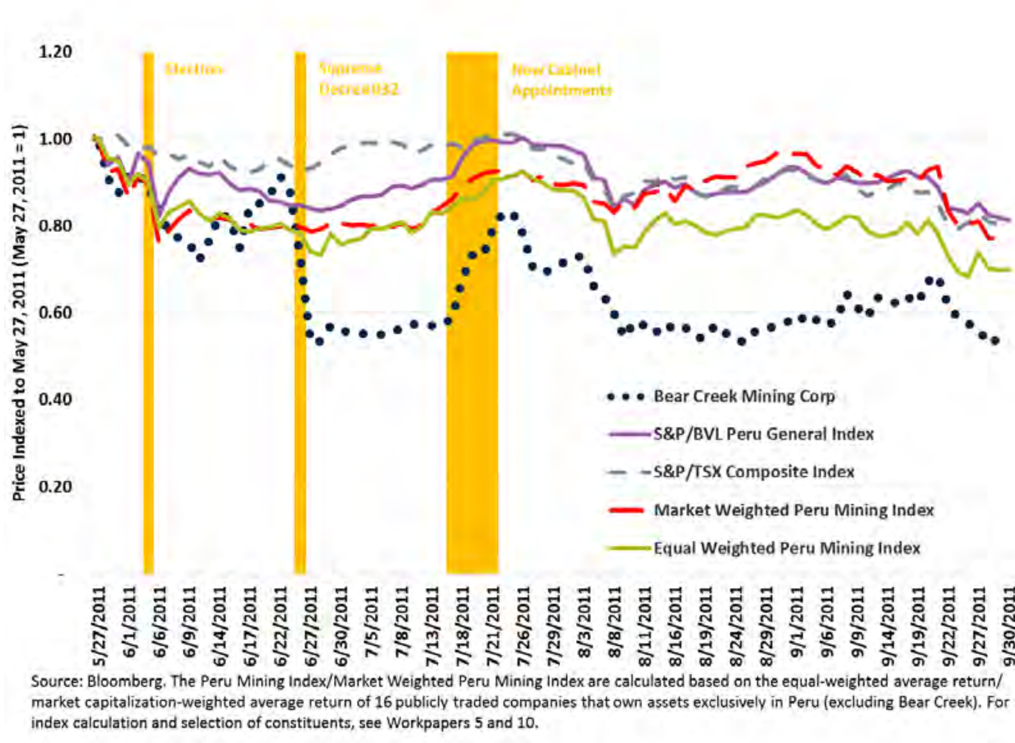
> make good in monetary terms some *enduring* alteration for the worse in the economic, financial or commercial position of the foreign investor which can be traced, in a sufficiently direct and proximate way, to the host State's unlawful course of action…[1221]

649. It follows that, for Claimant's Corani claim to succeed, Claimant must prove that it suffered "enduring" harm. Because Claimant bases its claim on a reduction in Bear Creek's share price in the wake of Supreme Decree No. 032, it must demonstrate that this reduction was

[1221] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, May 6, 2013 ("*Rompetrol*, Award"), para. 287 [Exhibit RLA-068] (emphasis added).

an “enduring” reduction in value, rather than a short-term, temporary dip. Claimant has not done so, and this alone is a sufficient reason to reject Claimant’s Corani claim.

650. In its Counter-Memorial, Respondent reproduced the following chart from Brattle, which shows that although Bear Creek’s share price (not surprisingly) dropped after the issuance of Supreme Decree 032, the stock rebounded quickly thereafter:[1222]



Source: Bloomberg. The Peru Mining Index/Market Weighted Peru Mining Index are calculated based on the equal-weighted average return/ market capitalization-weighted average return of 16 publicly traded companies that own assets exclusively in Peru (excluding Bear Creek). For index calculation and selection of constituents, see Workpapers 5 and 10.

This market reaction is consistent with the fact that Perú enacted Supreme Decree No. 032 for reasons inapplicable to Corani—Corani was not the target of violent protests, nor was Corani acquired illegally. Thus, the measure did not create a sustained increase in the market’s perception of Corani’s risk.

651. Given the rapid recovery of Bear Creek’s stock price, no evidence exists that Supreme Decree No. 032 caused any “enduring” impact on Corani’s market value. Respondent explained that after the share price recovered from the fleeting drop tied to Supreme Decree No.

[1222] Respondent’s Counter-Memorial at para. 372, citing Brattle First Report at Figure 6 [Exhibit REX-004].

032, any subsequent drop in Bear Creek's stock price could not logically be tied to the Santa Ana measures.[1223]

652. In its Reply, Claimant does not engage Respondent's argument directly. Instead, Claimant looks at Bear Creek's temporarily depressed share price "immediately after" Supreme Decree No. 032, compares that to Bear Creek's low share price today, and concludes that Supreme Decree No. 032 must have caused "lasting damage."[1224] In this way, Respondent asks the Tribunal to ignore five years of history—and the many factors that impacted Bear Creek's share price during that period—and draw a straight line between the stock price in 2011 and the stock price today. If the price was low immediately after June 23, 2011 and it is also low today, Claimant says, that must be Respondent's fault, and only Respondent's fault. But under this approach, Claimant is fortunate that today's date is not July 21, 2011—because according to the same chart, on that date, Bear Creek's share price was higher than the price before Supreme Decree No. 032 was issued. On that basis, Claimant would then be paying Respondent for its "good fortune" caused by Supreme Decree No. 032.

653. Claimant's argument has no basis in logic, law or economic theory. It also ignores the fact that the initial, short-term impact of Decree 032 on Claimant's stock price vanished almost immediately. As Brattle explains, the true driver of the poor performance of Bear Creek's stock price was the general downturn in the global mining sector. Brattle explains in the context of shorter term changes that:

[1223] Respondent's Counter-Memorial at para. 373.

[1224] Claimant's Reply at para. 454.

> all indices we considered, including the S&P/TSX Composite … and the S&P/BVL Perú General Index … experienced a decline at that time.[1225]

654. Another factor that likely impacted Claimant's stock price over this period—which also was entirely unrelated to the measures at issue in this Arbitration—was the market's growing suspicions of a critical technical risk to the viability of the Corani project. The issue relates to whether it is even possible to produce lead and zinc ore at Corani that is sufficiently concentrated to undergo metallurgical processing.[1226] As Brattle explains:

> Corani is a lead/zinc/silver ore deposit, where the silver is attached to the lead and zinc and will "piggy-back" on the lead and zinc recovery. The unique problem at Corani is that the lead and zinc grades are so low that it is not clear than they can be upgraded in a metallurgical process to a saleable metal.[1227]

655. If it is not possible to produce marketable lead and zinc concentrates at Corani, then it is not possible to produce silver at Corani. The latter depends on the former. And in that event, there will be no Corani project at all. Despite this critical risk—which SRK notes "could represent [a] fatal flaw[] to the development of the Corani Project,"[1228]—Claimant failed to resolve this issue in its 2009 Pre-Feasibility Study, its 2011 Feasibility Study, or, most importantly, its 2015 Updated Feasibility Study. Bear Creek told the market in 2009 and 2011 that this risk existed and could only be eliminated by successful metallurgical testing—but it then declined to conduct those tests in the ensuing four years or in its 2015 "updated" Feasibility Study, leading to the obvious conclusion that Bear Creek expects that the results would be

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[1225] Brattle Second Report at para. 278 [Exhibit REX-010].

[1226] SRK Second Report at paras. 70-73 [Exhibit REX-011]; Brattle Second Report at paras. 186-189 [Exhibit REX-011].

[1227] Brattle Second Report at para. 186 [REX-010].

[1228] SRK Second Report at para. 100 [REX-011].

negative. By this point, the market is well aware of this unresolved, fundamental risk to the Corani project's viability, and has discounted Bear Creek's stock price accordingly.

656. Of course, Respondent cannot be held liable for deteriorating market conditions in the global metals sector or the market's deteriorating confidence in Corani's technical feasibility. Yet, that is precisely what Claimant asks this Tribunal to do. In the end, Claimant cannot demonstrate that it suffered any long-term, enduring damage to its stock price for which Respondent bears any responsibility. As such, the Corani claim must be dismissed.

2. Claimant's Claim for Corani Damages Fails Because It Has Not Proven that Respondent's Actions Regarding Santa Ana Directly and Proximately Caused Any Damages to Corani

657. Even if Claimant could somehow demonstrate that it suffered lasting damage to Corani's market value linked to Respondent's actions, it would also need to prove that Respondent directly and proximately caused this harm. Claimant cannot do so. For this reason, too, the Corani damages claim cannot stand. Below we explain that: (i) to show causation, Respondent must prove that the measures related to Santa Ana were the direct and proximate cause of the alleged damage to Corani; and (ii) that Respondent's evidentiary showing on causation—which begins and ends with Mr. Swarthout's witness statements—does not satisfy the applicable international law standard.

a. Claimant Must Prove that Respondent's Actions at Santa Ana Were the "Direct and Proximate" Cause of Any Damages

658. Respondent's Counter-Memorial explained that to obtain an award of damages, Claimant must "prove … the necessary causal link between the loss or damage and the treaty breach."[1229] Respondent cited *ADM v. Mexico* for the proposition that Claimant must prove that

[1229] *Rompetrol*, Award para. 190 [Exhibit RLA-068]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007 ("*Archer Daniels*, Award"), para. 282 [Exhibit RLA-069] ("Any determination of damages under principles of

this essential link between breach and damage is "sufficiently clear [and] direct."[1230] Respondent also highlighted the *Rompetrol* award, which similarly held that claimants must establish a causal link is "direct and proximate."[1231]

659. Claimant does not deny that it carries the burden of proof on causation. Instead, Claimant seeks to lower this evidentiary hurdle by citing four cases where, Claimant says, other tribunals awarded damages based on attenuated chains of causation. Claimant does not succeed. As we explain below, none of the cases that Claimant cites addresses a situation where, as here, the claimant requested (let alone received), damages for one project *and* damages for an entirely separate, second endeavor. All of cases are therefore inapposite.

660. First, Claimant cites the *Sedco v. NIOC* decision.[1232] In Claimant's own words, the *Sedco* tribunal "awarded compensation for the replacement value of expropriated oil rigs but also for other losses in the form of lost income not generated due to the expropriation."[1233] Awarding lost income related to the expropriated asset is, of course, very different from awarding damages for the allegedly expropriated asset *and* a separate, second asset, which is what Claimant is proposing here. *Sedco*, therefore, does not help Claimant.

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international law require a sufficiently clear direct link between the wrongful act and the alleged injury, in order to trigger the obligation to compensate for such injury."); *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 ("*Biwater*, Award"), para. 779 [Exhibit RLA-075] ("compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is sufficient causal link between the actual breach of the BIT and the loss sustained."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, November 13, 2000 ("*S.D. Myers*, Partial Award"), para. 316 [Exhibit RLA-043]; *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, June 16, 2010 ("*Gemplus*, Award"), para. 11(8) [Exhibit RLA-064]; S. Ripinsky & K. Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 135 [Exhibit RLA-071].

[1230] *Archer Daniels*, Award at para. 282 [Exhibit RLA-069].

[1231] *Rompetrol*, Award at para. 287 [Exhibit RLA-068].

[1232] Claimant's Reply at para. 461.

[1233] Claimant's Reply at para. 461. *See also*, *SEDCO, Inc. v. National Iranian Oil Company*, Award No. 309-129-3, July 7, 1987, 15 IRAN-U.S. C.T.R 23, at paras. 78-87[Exhibit CL-0052].

661. Second, Claimant cites *Suez v. Argentina*.[1234] To borrow Claimant's characterization once more, the *Suez* tribunal "awarded compensation for full destruction of value under a DCF valuation but also additional losses that included cost of sponsored debt and management fees."[1235] Here again, the tribunal only awarded damages related to the asset <u>that was directly</u> impacted by the measures (the concessionaire subsidiary of the claimant). That, once again, is a very different situation from our case, where Claimant requests compensation for damages to an entirely separate project.

662. Third, Claimant cites *Inmaris v. Ukraine*, another unhelpful case for Claimant.[1236] The investor in *Inmaris* was a single-asset company whose business collapsed when its only asset—an interest in a passenger ship—became valueless after the Ukrainian Government prohibited the ship from leaving its territorial waters.[1237] Unsurprisingly, when the corporate claimant lost its only productive asset, it went bankrupt. The tribunal in that case ruled that the boat's detention in Ukraine caused the bankruptcy, and awarded damages accordingly. Thus, *Inmaris* is not the sweeping holding on causation that Claimant would like it to be. *Inmaris* was a statement of the obvious: impounding a company's only asset causes that company to go bankrupt. Furthermore, unlike Bear Creek, the claimant in *Inmaris* was not requesting damages related to a separate project. *Inmaris* is also, therefore, not helpful to Claimant.

[1234] Claimant's Reply, para. 461. To avoid confusion, Respondent notes that Claimant refers to the April 2015 Award in the case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.* (ICSID Case No. ARB/03/19) as "*Vivendi II*". Within the international arbitration community, this decision is typically referred to as "*Suez v. Argentina*". We adopt this more common nomenclature, and refer to this Award as *Suez*.

[1235] Claimant's Reply at para. 461. *See also*, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Award, Apr. 9, 2015 paras. 59 ff., 71 ff., and 87 ff [Exhibit CL-206].

[1236] Claimant's Reply at paras. 475-476.

[1237] *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, March 1, 2012, paras. 236-237 [Exhibit CL-0214].

663. Fourth and finally, Claimant cites *Lemire v. Ukraine*.[1238] The *Lemire* tribunal analyzed whether improprieties in the tendering process for radio station frequencies damaged the claimant in that case.[1239] The tribunal held that if the tendering process had been proper, the claimant would have received certain radio frequencies, allowing the claimant to create successful radio stations. This holding is not groundbreaking. The *Lemire* tribunal simply compensated Claimant for the damages that flowed directly and proximately from the improper tendering process. To parallel the situation here, the claimant in *Lemire* would have to have been awarded damages for *additional* radio stations that it might have hoped to develop using the profits from the successful operation of the initial stations. As such, *Lemire* does not advance Claimant's case.

In the table below, we set out the causal chains at issue in the four cases discussed above, contrasted with the chain of causation upon which the Corani claim relies:

[1238] Claimant's Reply at paras. 477-478.

[1239] *Joesph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, paras. 173-179. [Exhibit CL-0215].

Case	Chain of Causation
Sedco v. NIOC	Expropriated oil rigs (breach) → Loss of profits from those oil rigs (damage)
Suez v. Argentina	Expropriated water concession (breach) → Lost debt & management fees (damage)
Inmaris v. Ukraine	Ship restriction (breach) → Bankruptcy of company selling ship voyages (damage)
Lemire v. Ukraine	Faulty radio station tender (breach) → Lack of successful radio stations (damage)
Bear Creek's Corani Claim	Measures regarding Santa Ana (alleged breach) → Inability to construct and operate Santa Ana → Loss of Santa Ana profits → Less capital to invest at Corani → Difficulty financing Corani → Delayed development of Corani (damage)

664. As shown above, none of the cases Claimant has cited involved a chain of causation as attenuated as the one Claimant asks this Tribunal to accept.

665. A more apt precedent is *Metalclad v. Argentina*. The claimant in *Metalclad*, like Claimant here, sought the fair market value of the asset directly impacted by the measures at issue, and additional damages for supposed impacts to its other business ventures.[1240] The *Metalclad* tribunal rejected the additional damages claim, holding that the causal relationship between breach and damage was "too remote". The *Metalclad* tribunal stated:

> Metalclad also seeks an additional $20–25 million for the negative impact the circumstances are alleged to have had on its other business operations. The Tribunal disallows this additional claim because a variety of factors, not necessarily related to the La Pedrera development, have affected Metalclad's share price. The causal relationship between Mexico's actions and the reduction in value of Metalclad's other business operations are too remote and

[1240] *Metalclad*, Award at para. 115 [Exhibit CL-0105].

uncertain to support this claim. This element of damage is, therefore, left aside.[1241]

666. In this case, Claimant's Corani claim turns on a supposed "causal relationship" that is likewise, by any objective measure, "remote and uncertain." This Tribunal should accept the wisdom of the *Metalclad* tribunal, and reject Claimant's Corani damages claim.

b. Claimant Has Not Met Its Factual Burden to Prove Causation With Respect to Its Corani Claim

667. Even if Claimant could somehow succeed in lowering its burden of proof for causation, it would make no difference in this case. Claimant has not—by any standard—offered sufficient proof that Respondent's actions regarding Santa Ana damaged its investment in Corani. Quite remarkably, Claimant's Reply does not cite a single piece of documentary evidence to support its factual case on causation. Claimant also provides no expert evidence on this issue. Instead, Claimant's factual case on causation consists entirely of citations to Mr. Swarthout's witness statements, and his statements consist entirely of bald assertions with citations to nothing at all.[1242]

668. The key tenets of Mr. Swarthout's uncorroborated testimony are that Respondent's actions regarding Santa Ana have: (i) made it difficult for Bear Creek to finance Corani; (ii) have delayed the development of Corani; and (iii) have increased investors' perception of risk regarding Corani.[1243] If Mr. Swarthout's testimony were correct, a paper trail would exist to substantiate his story. For example, one would expect Claimant to have records of:

[1241] *Metalclad*, Award at para. 115 [Exhibit CL-0105].

[1242] For instance, Mr. Swarthout states that: "[i]t is absurd to argue that there is no causal link between Perú's actions against Santa Ana and damage to Corani," and "for Perú to argue that there has been no direct negative impact on Corani's value … defies logic," but cites no document to support those assertions. Rebuttal Witness Statement of Andrew T. Swarthout, January 6, 2016 ("Second Swarthout Statement"), at paras. 45 and 58.

[1243] Witness Statement of Andrew T. Swarthout, May 28, 2015 ("First Swarthout Statement"), at para. 46; Second Swarthout Statement, paras. 43-45, 52.

- Contemporaneous internal communications (e-mails, memos, financial analyses, etc.) explaining that Bear Creek believed Perú's actions regarding Santa Ana would impair, or already had impaired, its ability to finance Corani or meet its projected timeline for Corani's development.
- Contemporaneous external communications (correspondence with lenders, press releases, financial disclosures, etc.) explaining that Bear Creek expected that Perú's actions regarding Santa Ana would impair, or already had impaired, its ability to finance Corani or meet its projected timeline for developing Corani.
- Examples of the terms offered to potential investors or by potential financiers for Corani before and after Perú's actions regarding Santa Ana that show that Bear Creek had to offer investors a better deal or borrow from lenders on more onerous terms after Supreme Decree No. 032.
- Documents dated before Supreme Decree No. 032 evidencing investors' or lenders' interest in financing the Corani project (statements of interest, letters, e-mails, etc.), and documents dated after Supreme Decree No. 032 evidencing a new reluctance to finance Corani.

669. If Mr. Swarthout's testimony were accurate, these types of documents would be available to Claimant. And if these documents were available, Claimant would have had every motivation to submit them as exhibits. Claimant did not do so.[1244] The only conclusions one can draw are that: (i) no evidentiary support for Mr. Swarthout's testimony exists; and (ii) no evidentiary support exists because Mr. Swarthout's testimony is wrong.

670. Even more damning than the lack of corroborating evidence are the repeated public statements from Mr. Swarthout that contradict his witness testimony. For instance, Mr. Swarthout's testimony today is that: "[i]t is absurd to argue that there is no causal link between Perú's actions against Santa Ana and damage to Corani."[1245] But that is not what Mr. Swarthout

[1244] The silence of Claimant's experts on the issue of causation is also telling. As Brattle notes, independently assessing the factors that impacted Corani's financing is a task that falls very comfortably within the expertise of Claimant's valuation experts. Brattle Second Report at para. 256 [Exhibit REX-010]. Yet, instead of providing its own economic analysis, FTI simply recites Mr. Swarthout's unsupported testimony. Second FTI Report at paras. 8.16-8.19. FTI does not explain why.

[1245] Second Swarthout Statement at para. 45.

said at the time in 2011. As Respondent pointed out in its Counter-Memorial,[1246] during a call with market analysts on June 27th of that year, Mr. Swarthout stated that:

> Corani is *unaffected* by the actions taken by the government or the protests and is on track for completion of the Feasibility Study …. So I think Corani can move forward, regardless of what we do, whether it's seek a political solution to Santa Ana or legal recourse. So Corani, *we don't see the timeline as affected* …[1247]

671. In his Second Witness Statement, Mr. Swarthout tries to explain away this contradiction, by stating that:

> [W]hen I told market analysts on June 27, 2011 that 'Corani is unaffected by the actions taken by the government or the protests and is on track for completion of the Feasibility Study,' I was clearly referring to the lack of protests near Corani, and to the fact that Supreme Decree 032 was applicable only to Santa Ana and had not affected our ownership of Corani or the 2011 Feasibility Study, which I noted on the call was 70% complete.[1248]

672. Mr. Swarthout's attempted explanation ignores the remainder of his own quote, where he stated that for "Corani, we don't see the *timeline* as affected."[1249] If Mr. Swarthout believed that Supreme Decree No. 032 would make it impossible to finance, and thereby delay, the Corani project (as he claims today), he would never have told market analysts back in June 2011 that the Corani project timeline would not be affected by the Decree.

673. Furthermore, Mr. Swarthout's June 27, 2011 statement is no aberration. He made a series of similar statements—each of which contradicts his current testimony in this Arbitration—in the years that followed:

[1246] Respondent's Counter-Memorial at para 379.

[1247] Transcript of Bear Creek Mining Corporation "Special Call," June 27, 2011, pp. 3, 7 [Exhibit R-186] (emphasis added).

[1248] Second Swarthout Statement at para. 48 (internal citation omitted).

[1249] Transcript of Bear Creek Mining Corporation "Special Call," June 27, 2011 , p. 7 [Exhibit R-186] (emphasis added).

- In March 2013, during an interview on the "Daily Gold" podcast, Mr. Swarthout stated that despite the issues at Santa Ana, "Corani marches along just fine."[1250]

- In May 2014, Mr. Swarthout told a group of analysts that: "Bear Creek has not been in as strong a position for several years as we are today. We have Corani moving forward *totally uninterfered* by this Santa Ana process."[1251]

- In September 2015, just a few months before he signed his latest witness statement, Mr. Swarthout told an audience at the Precious Metals Summit that the issues at Santa Ana represented "*no interference* with the advancement of the Corani asset."[1252]

674. It follows that either: (i) Mr. Swarthout's repeated public statements were false; or (ii) Mr. Swarthout's witness statements are incorrect. Either way, the Tribunal cannot put any faith in Mr. Swarthout's credibility in the face of this inconsistency. And without Mr. Swarthout's statements, Claimant's already scant factual case on causation fades to nothing at all.

c. Issues that Relate Only to Claimant Cannot Reduce Corani's Market Value

675. Even if the Tribunal were to somehow accept Mr. Swarthout's testimony, Claimant's causation claim would still fail, because issues that are specific to Bear Creek—such as its particular difficulties financing the Corani project—cannot decrease the fair market value of Corani. As noted in Respondent's Counter-Memorial,[1253] markets value an asset at its most profitable use, and in the hands of its most efficient owner. Thus, if *Bear Creek* faced financing difficulties at Corani, this would not lower Corani's *market* value if another mining company could have bought and developed the site without these financial problems.

[1250] Daily Gold Podcast, March 8, 2013, *available at* https://www.youtube.com/watch?v=d7Ik3MNrzjY (at 5:31) [Exhibit R-383].

[1251] Bear Creek Mining Corporation, "Special Call," May 14, 2014, p. 4 (emphasis added) [Exhibit BR-134].

[1252] Andrew Swarthout, "Speech before the Precious Metals Summit Conference," September 2105, *available at* http://www.gowebcasting.com/events/precious-metals-summit-conferences-llc/2015/09/18/bear-creek-mining-corp/play/stream/16073 (at 18:35) (emphasis added) [Exhibit R-384].

[1253] Respondent's Counter-Memorial at paras. 376 *et seq*.

676. Brattle explains that a robust market exists for mining properties similar to Corani.[1254] So-called “major” or “senior” mining companies—with vast financial resources and no need to rely on external financing—regularly buy properties from “junior” explorers like Bear Creek.[1255] By engaging in this type of sale, Claimant could have mitigated any financing-related damages by selling Corani—at a fair market price—to a buyer that was able to finance the project, even if Bear Creek was unable to do so. If indeed Corani lost some [$170 million] in value because of Bear Creek’s idiosyncratic inability to finance Corani in light of the Santa Ana experience, then Bear Creek’s fiduciary duty to its shareholders would have been to sell the asset for its FMV.

677. Claimant does not try to refute this point in its Reply, but Mr. Swarthout responds in his witness statement. Mr. Swarthout seems to suggest that Respondent’s mitigation argument is neither here nor there, because “Bear Creek never intended to sell either project,” and because Bear Creek’s “strategy never envisioned mitigating our losses by selling Corani.”[1256] Unfortunately for Claimant, the FTA does not provide for compensation in accordance with an investor’s idiosyncratic ‘intentions’ and ‘strategies’; it provides for compensation in accordance with losses in *market* value, which do not turn on one owner’s plans. Claimant’s specific hopes and dreams for Corani do not factor into the analysis.

678. FTI attempts to argue that a sale of Corani would have been a “fire sale” and resulted in a depressed price. But, as Brattle notes, FTI overlooks that a forced sale occurs when the seller has no time to market the asset adequately, which was not the case here. Bear Creek had adequate liquidity to conduct its business for more than four years since the Santa Ana

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[1254] Brattle First Report at para. 155 [Exhibit REX-004].

[1255] Brattle First Report at para. 155 [Exhibit REX-004].

[1256] Second Swarthout Statement at para. 50.

events, during which it continued to develop Corani, and during which it would have had sufficient time to conduct an orderly and value-maximizing sale.[1257]

679. As a final note, as Respondent stated in its Counter-Memorial,[1258] even if Claimant could show that Respondent's actions regarding Santa Ana somehow harmed Claimant's investment in Corani, the impact would be minimal for at least three reasons.

680. First, even if Claimant's assertion that it would have used cash flows generated at Santa Ana to pay for part of the $574 million up-front capital costs at Corani were true,[1259] the Santa Ana cash flows could have covered only a fraction of those expenses. Thus, even if Santa Ana had proceeded through permitting and construction precisely as planned, and began profitable operation exactly as Claimant hoped, Claimant would nonetheless have needed to attract substantial outside funding to develop Corani. A lack of internal financing would have been only a minor obstacle relative to its external financing needs.

681. Second, due to Supreme Decree No. 032, Claimant avoided spending a projected $71 million in construction costs by not building the Santa Ana mine.[1260] This amount exceeds the free cash flow that Bear Creek projected from the first year of production at Santa Ana (which Claimant claims would have been used to finance Corani),[1261] and Claimant is now free to deploy those funds at Corani. In his witness statement, Mr. Swarthout suggests (but does not definitively state) that Bear Creek cannot use those funds at Corani, because the "Use of

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[1257] *See Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, January 29, 2016, at paras. 564-65 [Exhibit RLA-096].

[1258] *See* Respondent's Counter-Memorial at paras. 382-385.

[1259] Claimant's Memorial at para. 56.

[1260] Ausenco Vector, Revised Feasibility Study – Santa Ana Project – Puno, Perú – NI 43-101 Technical Report, Update to the Oct. 21, 2010 Technical Report, April 1, 2011, Table 1.4 [Exhibit C-0061].

[1261] Brattle First Report at para. 159 [Exhibit REX-004].

Proceeds" provision of the equity offering directed the funds to Santa Ana.[1262] As Brattle notes, however:

> Bear Creek has used the majority of [the $71 million] for purposes other than the construction of Santa Ana. As of December 31, 2015, Bear Creek has cash reserves of $22.7 million, less than a third of the $71 million intended for Santa Ana's construction. As Bear Creek has not returned these funds to investors, and Santa Ana has not been constructed, it is clear that the terms of the equity offering did not prevent Bear Creek from using the proceeds for other purposes, including to advance Corani.[1263]

682. Third, Bear Creek's assumption that it incurred damages simply because it would need additional outside financing to build the Corani mine conflicts with elementary economic principles. As Brattle explains in its Second Report, "it is not more costly to finance a project with outside funds than it is to do so with internal funds."[1264]

683. For these reasons, even if Claimant could show that Respondent's actions damaged its investment at Corani, the losses would have been much less than Claimant suggests. The quantum of these unproven damages is addressed in Section 3 below.

d. <u>Conclusion on Causation</u>

684. In the end, no amount of legal argument can obscure the conspicuous factual flaws in Claimant's causation argument for its claimed Corani damages. Even after Respondent criticized Claimant for relying on Mr. Swarthout's witness testimony, in its Reply Claimant was unable to marshal any new documentary evidence suggesting that Supreme Decree No. 032

[1262] Second Swarthout Statement at para. 54.

[1263] Brattle Second Report at para. 262 [Exhibit REX-010].

[1264] Brattle Second Report at para. 258 [Exhibit REX-010]. *See also* Brattle First Report at para. 156 [Exhibit REX-004] ("Basic financial economics principles imply that while borrowing (or issuing equity) has explicit costs (*e.g.,* interest expense or dividends to the new shareholders), using internal funds is also costly because of their opportunity cost. It is an economic fallacy to argue, for example, that by using internal funds a company is 'saving' the interest expense of borrowing the same amount, because the internal funds could have been invested and generated returns.").

damaged the Corani project. Instead, Claimant relies once again on Mr. Swarthout, whose second statement simply echoes his first. He concludes—citing nothing at all— that "[i]t is absurd to argue that there is no causal link between Perú's actions against Santa Ana and damage to Corani."[1265] What is absurd, however, is Claimant's singular, steadfast reliance on Mr. Swarthout to prove causation, even after his testimony has been proven unreliable. In light of Claimant's complete failure to carry its burden on causation, Claimant's Corani claim must fail.

3. Claimant's Calculation of Corani Damages Is Internally Inconsistent

685. For the reasons set out above, the Tribunal need not undertake a damages calculation for Corani—Claimant has failed to prove it suffered *any* Corani-related damages from the Santa Ana measures. As such, Respondent will not address Claimant's Corani damages calculation in depth.

686. However, Respondent cannot help but revisit one particularly glaring inconsistency in FTI's approach(es) to valuation: FTI adopts a stock market-based method for valuing the alleged damages to Corani.[1266] This approach directly contradicts its methodology for valuing Santa Ana, where FTI *refuses* to calibrate its DCF results to align them with reality, *i.e.*, the actual market value of Santa Ana as reflected in Bear Creek's share price. FTI spends considerable time discrediting the value of share price data when applied to Santa Ana,[1267] and at one point even states that the "share price does not provide a reliable measure of the FMV of *either* Santa Ana or Corani."[1268] Yet, FTI is perfectly happy to base its $170 million Corani

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[1265] Second Swarthout Statement at para. 45.

[1266] FTI Report at paras. 8.4 *et seq*.

[1267] FTI Reply Report at paras. 6.1 *et seq*.

[1268] FTI Reply Report at para. 8.4 (emphasis added).

damages estimate *exclusively* on changes in share price.[1269] FTI never resolves this core inconsistency.[1270]

4. Conclusion Regarding Claimant's Corani Damages Claim

687. In its Counter-Memorial, Respondent asserted that Claimant's request for Corani-related damages was a 'throw-away' claim, put forward merely to inflate damages in the hopes that the Tribunal would "split the baby" at a higher midpoint.[1271] Nothing in Claimant's Reply submission changes that assessment. Once again, Claimant (i) devoted little discussion to its Corani claim; (ii) failed to cite a single piece of documentary evidence to support its causation argument for Corani; and (iii) failed to explain or justify the fundamental inconsistency in its Corani damages calculation. In short, Claimant's request for Corani damages is, and always has been, a 'throw-away' claim. Respondent invites the Tribunal to do just that.

E. CLAIMANT'S INTEREST CALCULATION IS ERRONEOUS

688. In its Counter-Memorial, Respondent explained that in principle, it agreed with Claimant's position that the appropriate interest rate is "a rate equivalent to Perú's external cost of debt financing from private lenders."[1272] Respondent disagreed, however, with the rate that Claimant suggested as representing Perú's external cost of debt. Respondent explained that the 5% statutory rate for domestic court judgments that Claimant asked the Tribunal to apply was not equivalent to, nor in any way indicative of, Perú's external cost of debt.[1273] As an alternative, Respondent identified an appropriate cost-of-debt proxy, which it based on the

[1269] FTI Reply Report at paras. 8.6 *et seq*.

[1270] FTI also never answers Respondent's contention that it strategically mixed these conflicting valuation methodologies to inflate Corani damages. Respondent set out its argument on this issue in detail at paragraphs 390 *et seq*. of its Counter-Memorial.

[1271] Respondent's Counter-Memorial at para. 18.

[1272] Respondent's Counter-Memorial, at para. 402, *quoting* Claimant's Memorial at para. 247.

[1273] Respondent's Counter-Memorial at para. 404.

average spread for Perú's sovereign credit default swaps.[1274] Respondent's proposed annual interest rate of 0.65% was an order of magnitude lower than Claimant's inappropriate statutory rate of 5% per annum.

689. In its Reply, Claimant makes no effort to defend its odd use of the 5% statutory rate for domestic court judgments. Instead, Claimant sets aside the statutory rate, but argues that a 5% rate is correct anyway—for an entirely new and different reason.[1275] Now, Claimant says a 5% rate is correct because it is a reflection of *Claimant's* cost of borrowing, not *Perú's*.[1276] As Brattle explains, Claimant cannot get its story straight:

> [using] Claimant's borrowing cost is inconsistent both with Claimant's theory of interest, which is based on Respondent's cost of borrowing, and with Claimant's counsel's instruction to FTI to use a Peruvian Central Bank reference rate.[1277]

690. Unlike Claimant, whose approach has shifted precipitously between its two reports, Respondent's position remains steady: the appropriate interest rate is the average spread for Perú's sovereign credit default swaps, plus a risk-free rate adjustment. Brattle's calculation of that rate remains unchanged, except for considering the additional time since the date of its first report, which updates the average interest rate to 0.72% annually.[1278]

F. RESPONDENT SHOULD BE AWARDED ITS COSTS AND LEGAL FEES

691. As noted in Respondent's Counter-Memorial, investment arbitration tribunals have awarded costs and fees to respondent States that faced unmeritorious claims.[1279] After two

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[1274] Respondent's Counter-Memorial at para. 405.

[1275] Claimant's Reply at paras. 500-501.

[1276] Brattle Second Report at para. 295 [Exhibit REX-010]; Claimant's Reply at para. 501.

[1277] Brattle Second Report at para. 295 [Exhibit REX-010].

[1278] Brattle Second Report at para. 289 [Exhibit REX-010].

[1279] *See, e.g.*, *Iberdrola Energia S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award, August 17, 2012, paras. 515-516 [Exhibit CL-0117]; *Burimi SRL and Eagle Games SH.A v. Republic of Albania*, ICSID Case

rounds of written pleadings, Claimant has failed to demonstrate any reason why the Tribunal should not dismiss its claims on both jurisdictional and merits grounds. As such, Respondent requests that the Tribunal order Claimant to pay the costs and fees (including attorneys' fees) that Respondent has incurred, and will continue to incur, in defending against Claimant's meritless allegations. Respondent will stand ready to provide a complete accounting of these sums in a costs submission at the end of these proceedings.

VI. RELIEF REQUESTED

692. For the foregoing reasons, Respondent respectfully requests that the Tribunal dismiss all of Claimant's claims for want of jurisdiction, or, in the alternative, on their merits, and award Respondent the costs and fees, including attorneys' fees, it has incurred in this Arbitration.

Respectfully submitted,

Stanimir Alexandrov
Counsel for Respondent

No. ARB/11/18, Award, May 29, 2013, paras. 162-164 [Exhibit RLA-073]; *RSM Production Corporation and others v. Grenada [II]*, ICSID Case No. ARB/10/6, Award, December 10, 2010, para. 8.3.4 [Exhibit RLA-074].